CHAPTER I

DEVELOPMENT OF LIABILITY BASED UPON FAULT

"Tort" comes from the Latin word "tortus," which means twisted, and the French word "tort," which means injury or wrong. A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy. This area of law imposes duties on persons to act in a manner that will not injure other persons. A person who breaches a tort duty has committed a tort and may be liable to pay damages in a lawsuit brought by a person injured because of that tort.

Over the years, tort law has been principally a part of the common law, developed by the courts through the opinions of the judges in the cases before them. Within some areas of tort law, however, statutes have long been common—e.g., trespass to real property, limitation of actions, wrongful death actions; and in recent years the legislature has had an increasingly more significant role.

Modern Tort Law—Beyond the Casebooks Into the Field of Public Debate. From the time this casebook began with its first edition in the early 1950's, tort law was of concern primarily to law students, law professors, and attorneys who practiced in the field. The public, in general, knew very little, if anything, about the subject. In the past few decades, however, this has changed quite dramatically. Prior to coming to law school, you probably read about healthcare providers who were unable to obtain affordable medical malpractice coverage, about people injured through someone else's fault who could not recover compensation because the cost of the lawsuit would have been more than they could recover, or about manufacturers going out of business or declining to put new and useful products on the market, all because of problems in the area of "tort law."

Both the Federal Government and state governments have examined these issues and legislation affecting tort law has multiplied in recent years. As you study the law of torts, you may find that you will be reading news stories about the subject from a new perspective. You may decide that many stories oversimplify the tort system and perhaps miss critical points. It is important to pay attention to these stories because the subject you are studying is dynamic, complex, and at the center of major public policy debates.

In studying the subject, you should consider the major purposes of tort law: (1) to provide a peaceful means for adjusting the rights of parties who might otherwise "take the law into their own hands"; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior; (4) to restore injured parties to their original condition, insofar as the law can do this, by

compensating them for their injury; and (5) to vindicate individual rights of redress. Should people always be compensated when they have been injured by the action of another? If your answer to this question is in the affirmative, think about whether it is always necessary to have a trial, with a plaintiff, a defendant, and lawyers. On the other hand, if tort law should not compensate every person who is injured by another, what are appropriate rules and standards to determine whom to compensate and under what circumstances? This is the primary problem to which the law of torts addresses itself. Consider also how tort law evolves to meet changing circumstances—the great virtue of the common law. See Schwartz, Silverman & Goldberg, Neutral Principles of Stare Decisis in Tort Law, 58 S.C. L.Rev. 317 (2005) (suggesting principles for departure from traditional common law concepts).

It is important to remember, also, that in back of the tort system is an insurance system. Even non-lawyers know that most people who are sued in tort law have some form of liability insurance. The "crises" that have occurred in tort law often have been precipitated by difficulty in obtaining or affording liability insurance. These difficulties, in turn, may lead to problems that more directly affect the public—a fireworks display is not held, a physician no longer delivers babies, a useful product is not marketed, an injured person remains uncompensated by a liable but insolvent tortfeasor.

The casebook will explore the system that has been accused of having caused these crises. Evaluate it carefully, and remember that you are not only learning a legal subject, but also becoming an educated citizen who can and should participate in the debate about the direction tort law should take now and into the 21st century.

Historical Origins. Historians have differed as to how the law of torts began. There is one theory that it originated with liability based upon "actual intent and actual personal culpability," with a strong moral tinge, and slowly formulated external standards that took less account of personal fault. O. Holmes, The Common Law, Lecture I (1881). It seems quite likely that the most flagrant wrongs were the first to receive redress.

Another, and more generally accepted theory, is that the law began by imposing liability on those who caused physical harm, and gradually developed toward the acceptance of moral standards as the basis of liability. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv.L.Rev. 315, 383 & 441 (1894). Ames, Law and Morals, 22 Harv.L.Rev. 97 (1908). An alternative theory is that there has been no steady progression from liability without fault to liability based on fault. The difference between no-fault periods and fault-based periods is, rather, one of degree. Isaacs, Fault and Liability, 31 Harv.L.Rev. 954, 965 (1918).

Certainly at one time the law was not very much concerned with the moral responsibility of the defendant. "The thought of man shall not be tried," said Chief Justice Brian, in Y.B. 7 Edw. IV, f. 2, pl. 2 (1468), "for the devil himself knoweth not the thought of man." The courts were interested primarily in keeping the peace between individuals by *providing*

a substitute for private vengeance, as the party injured was just as likely to take the law into his own hands when the injury was an innocent one. The person who hurt another by unavoidable accident or in self-defense was required to make good the damage inflicted. "In all civil acts," it was said, in Lambert v. Bessey, T.Raym. 421, 83 Eng.Rep. 220 (K.B.1681), "the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."

Forms of action. In the early English law, after the Norman conquest, remedies for wrongs were dependent upon the issuance of writs to bring the defendant into court. In the course of the thirteenth century, the principle was established that no one could bring an action in the King's common law courts without the King's writ. As a result of the jealous insistence of the nobles and others upon the prerogatives of their local courts, the number of writs that the King could issue was limited, and their forms were strictly prescribed. There were, in other words, "forms of action," and unless the plaintiff's claim could be fitted into the form of some established and recognized writ, the plaintiff could not seek money damages in the King's courts. The result was a highly formalized system of procedure that governed and controlled the law as to the substance of the wrongs that might be remedied. You may learn more about how the forms of action affected the law of procedure in your civil procedure classes.

Two common law writs are the genesis of tort law—the writ of trespass and the writ of trespass on the case, often called action on the case.

The form of action in trespass originally had a criminal character. It would lie only in cases of forcible breaches of the King's peace, and it was only on this basis that the royal courts assumed jurisdiction over the wrong. The purpose of the remedy was at first primarily that of punishment of the crime; but to this there was added later the satisfaction of the injured party's claim for redress. If the defendant was found guilty, damages were awarded to the successful plaintiff, and the defendant was imprisoned, and allowed to purchase his release by payment of a fine. What similarity remains between tort and crime is to be traced to this common beginning. See Woodbine, The Origin of the Action of Trespass, 33 Yale L.J. 799 (1923), 34 Yale L.J. 343 (1934); F. Maitland, The Forms of Action at Common Law, 65 (1941).

The writ of trespass on the case developed out of the practice of applying to the Chancellor, in cases in which no writ could be found in the Register to cover the plaintiff's claim, for a special writ, in the nature of trespass, drawn to fit the particular case. Historians have differed as to the origin of this practice. Attempts to trace it are found in C. Fifoot, History and Sources of the Common Law: Tort and Contract, 66–74 (1949), and Kiralfy, The Action on the Case, Chapter I (1951).

Whatever may have been its origin, it was through this action on the case, rather than through trespass, that most of modern tort and contract law developed. Thus, in the field of tort law, actions for nuisance, conversion, deceit, defamation, malicious prosecution, interference with economic relations, and the modern action for negligence all developed out of the action on the case.

The distinction between trespass and case lay in the direct and immediate application of force to the person or property of the plaintiff. Trespass would lie only for direct and forcible injuries; case, for other tangible injuries to person or property. The classic illustration of this distinction is that of a log thrown into the highway. A person struck by the rolling log could maintain trespass against the thrower, since the injury was direct and immediate; but one who came along later and was hurt by stumbling over the stationary log could maintain only an action on the case. Leame v. Bray, 3 East 593, 102 Eng.Rep. 724 (1802).

Note that the distinction was not one between intentional and negligent conduct. The emphasis was upon the causal sequence, rather than the character of the defendant's wrong. Trespass would lie for all forcible, direct injuries, whether or not they were intended, while the action on the case might be maintained for injuries intended but not forcible or not direct. There were two additional significant points of difference between the two actions. Trespass, because of its quasi-criminal character, required no proof of any actual damage, since the invasion of the plaintiff's rights by the criminal conduct was regarded as a tort in itself; while in the action on the case, which developed purely as a civil remedy, there could ordinarily be no liability unless actual damage was proved. Also, in its earlier stages trespass was identified with the view that liability might be imposed without regard to the defendant's fault, while case always had required proof of culpability: either a wrongful intent or wrongful conduct (negligence).

The criminal aspect of trespass disappeared in 1697, when the statute of 5–6 William & Mary, c. 12, abolished the fine and left the action as an exclusively civil remedy. Out of adherence to precedent, however, the courts continued to allow the action even though no real injury was suffered. They were, however, disinclined to extend the scope of trespass beyond the existing precedents, perhaps because of the belief that punishment was primarily the function of the criminal law and the civil action should be used only to compensate for harm done. This explains why in modern law there is a requirement of proving actual damages except in cases of assault, offensive but harmless battery, false imprisonment, and trespass to land. If harm was done, the injured party could still sue in case and recover, even though the defendant's wrong did not amount to a trespass. If no harm was done, the recovery of punitive damages in a civil action was limited to the most flagrant cases, where the criminal law did not apply or was not effective as a deterrent.

Hulle v. Orynge
(The Case of Thorns)

King's Bench, 1466.
Y.B.M. 6 Edw. IV, folio 7, placitum 18.

BRIAN. In my opinion if a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others. As in

the case where I erect a building, and when the timber is being lifted a piece of it falls upon the house of my neighbor and bruises his house, he will have a good action, and that, although the erection of my house was lawful and the timber fell without my intent.

Similarly, if a man commits an assault upon me and I cannot avoid him if he wants to beat me, and I lift my stick in self-defense in order to prevent him, and there is a man in back of me and I injure him in lifting my stick, in that case he would have an action against me, although my lifting the stick was lawful to defend myself and I injured him without intent.

NOTES AND QUESTIONS

1. This passage, translated from the Norman French, is one of the few bits and fragments of the early English law of torts that have come down to us. Although Brian, who became Chief Justice of the Court of Common Pleas in 1471, was apparently only arguing as counsel in this case, he appears to have been summarizing accepted law.

Weaver v. Ward

King's Bench, 1616.
Hobart 134, 80 Eng.Rep. 284.

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded, that he was amongst others by the commandment of the Lords of the Council a trained soldier in London, of the band of one Andrews captain; and so was the plaintiff, and that they were skirmishing with their muskets charged with powder for the exercise in re militari [in a military matter], against another captain and his band; and as they were so skirmishing the defendant casualiter & per infortunium & contra voluntatem suam [accidentally and by misfortune and against his will] in discharging his piece did hurt and wound the plaintiff, which is the same, & c. absque hoc [without this], that he was guilty aliter sive alio modo [otherwise or in another manner].

And upon demurrer by the plaintiff, judgment was given for him; for though it were agreed, that if men tilt or turney in the presence of the King, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatick kill a man, or the like, because felony must be done animo felonico [with a felonious mind]; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, prout ei bene licuit [as is properly permitted to him]), except it may be judged utterly without his fault.

As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had

appeared to the Court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt.

NOTES AND QUESTIONS

1. This is the earliest known case in which it was clearly recognized that a defendant might not be liable, even in a trespass action, for a purely accidental injury occurring entirely without his fault. Note that the burden rests upon the defendant to plead and prove his freedom from all fault.

2. The next two centuries saw a gradual blurring of the distinction between trespass and case. The procedural distinction is now long antiquated, although some vestige of it still remains in jurisdictions retaining common law pleading in a modified form. Modern law has almost entirely abandoned the artificial classification of injuries as direct and indirect, and looks instead to the intent or negligence of the wrongdoer.

3. The first step was taken when the action on the case was held to cover injuries that were merely negligent but were directly inflicted, as in Williams v. Holland, 10 Bing. 112, 131 Eng.Rep. 848 (1833) (plaintiff's cart was overturned by collision with wheel of defendant's gig, which was engaged in a race with another gig). Although this left the plaintiff an election between trespass and case, the action of case came to be used quite generally in all cases of negligence, whether direct or indirect, while trespass remained as the remedy for intentional injuries inflicted by acts of violence. Terms such as battery, assault, and false imprisonment, which were varieties of trespass, gradually came to be associated only with intent, and negligence emerged as a separate tort. The shift was a slow one, and the courts seem to have been quite unconscious of it at the time. When in the nineteenth century the old forms of action were replaced in most jurisdictions by the modern code procedure, the new classification remained. Prichard, Trespass, Case and the Rule in Williams v. Holland, Cambridge L.J. 234 (1964). There was occasional confusion, and some talk, for example, of a negligent battery, as in Anderson v. Arnold's Ex'r, 79 Ky. 370 (1881), but, in general, these old trespass terms are now restricted to actions involving intent.

4. Although we no longer have "forms of action," it usually is helpful from the vantage point of advocacy to place one's claim under a tort label that will be familiar to the court—e.g., "battery," "assault," "negligence," "defamation," "nuisance"—and that is still the common practice in both state and federal courts.

5. With certain exceptions, actions for injuries to the person, or to tangible property, now require proof of an intent to inflict them or of failure to exercise proper care to avoid them. As to the necessity of proving actual damage, the courts have continued the distinctions found in the older actions of trespass and case. Whether the damage is essential to the existence of a cause of action for a particular tort depends largely upon its ancestry in terms of the old procedure.

6. The story of the change in the law is narrated in Gregory, Trespass to Negligence to Absolute Liability, 37 Va.L.Rev. 359 (1951); Roberts, Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein, 50 Cornell L.Q. 191 (1964); Kretzmer, Transformation of Tort Liability in the 19th Century, 4 Oxf.J.Leg.Stud. 46 (1984). A thoughtful perspective on the problems presented in this chapter is Malone, Ruminations on the Role of Fault in the History of the Common Law of Torts, 31 La.L.Rev. 1 (1970) and David Ibbetson, A Historical Introduction to the Law of Obligations (Oxford University Press 2000).

Brown v. Kendall

Supreme Judicial Court of Massachusetts, 1850.
60 Mass. (6 Cush.) 292.

This was an action of trespass for assault and battery. * * * [Two dogs, owned by plaintiff and defendant, were fighting. Defendant tried to separate them by hitting them with a stick. In doing so he backed up toward the plaintiff, and in raising his stick over his shoulder, hit plaintiff in the eye, and injured him.]

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case * * *

Chief Justice Shaw

[The trial judge, refusing to give requested instructions to the contrary, instructed the jury that if hitting the dogs was a necessary act which defendant was under a duty to do, defendant was required to use only ordinary care in doing it; but if it were only a proper and permissible act, defendant was liable unless he exercised extraordinary care; and that the burden of proving the extraordinary care was on the defendant.]

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C.J. * * * The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. [Cc]

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These *dicta* are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. * * *

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85 to 92; [c]. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. [Cc] In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were

using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. * * *

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant,) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. [Cc]

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

NOTES AND QUESTIONS

1. Why a new trial? Why not simply a judgment for the defendant?

2. What has gone on in the law since Hulle v. Orynge in 1466? How would Justice Shaw have decided Weaver v. Ward?

3. This decision is the earliest clear statement of the rule commonly applied: liability must be based on legal fault.

4. While Brown v. Kendall dealt with a defendant who was separating dogs, many tort defendants in Massachusetts at the time were industrial employers. Does this fact, plus the social policy of the time, have a bearing on the legal change reflected in the opinion? See Schwartz, The Character of Early American Tort Law, 36 U.C.L.A. L. Rev. 641, 667–670 (1989).

5. In some jurisdictions, the old distinction between trespass and case survived until comparatively recent dates, in the form of decisions holding that if the injury is one for which trespass would lie, the defendant must sustain the burden of proving that he was not at fault, while if only case would lie the burden of proving fault is on the plaintiff. The distinction was not finally abandoned in England until Fowler v. Lanning, [1959] 1 Q.B. 426.

Cohen v. Petty

Court of Appeals of the District of Columbia, 1933.
62 App.D.C. 187, 65 F.2d 820.

GRONER, ASSOCIATE JUSTICE. Plaintiff's declaration [complaint] alleged that on December 14, 1930, she was riding as a guest in defendant's automobile; that defendant failed to exercise reasonable care in its operation, and drove

it at a reckless and excessive rate of speed so that he lost control of the car and propelled it off the road against an embankment on the side of the road, as the result of which plaintiff received permanent injuries. The trial judge gave binding instructions [directed a verdict], and the plaintiff appeals.

There were four eyewitnesses to the accident, namely, plaintiff and her sister on the one side, and defendant and his wife on the other. All four were occupants of the car. Defendant was driving the car, and his wife was sitting beside him. Plaintiff and her sister were in the rear seat. * * * After passing the Country Club, and when somewhere near Four Corners and five or six miles from Silver Spring, the automobile suddenly swerved out of the road, hit the abutment of a culvert, and ran into the bank, throwing plaintiff and her sister through the roof of the car onto the ground.

Plaintiff's sister estimated the speed of the car just before the accident somewhere between thirty-five and forty miles an hour, and plaintiff herself, who had never driven a car, testified she thought it was nearer forty-five. The place of the accident was just beyond a long and gradual curve in the road. Plaintiff testified that just before the accident, perhaps a minute, she heard the defendant, who, as we have said, was driving the car, exclaim to his wife, "I feel sick," and a moment later heard his wife exclaim in a frightened voice to her husband, "Oh, John, what is the matter?" Immediately thereafter the car left the road and the crash occurred. Her sister, who testified, could not remember anything that occurred on the ride except that, at the time they passed the Country Club, the car was being driven about thirty-five or forty miles an hour and that the occupants of the car were engaged in a general conversation. The road was of concrete and was wide. Plaintiff, when she heard defendant's wife exclaim, "What is the matter?" instead of looking at the driver of the car, says she continued to look down the road, and as a result she did not see and does not know what subsequently occurred, except that there was a collision with the embankment.

Defendant's evidence as to what occurred just before the car left the road is positive and wholly uncontradicted. His wife, who was sitting beside him, states that they were driving along the road at the moderate rate of speed when all of a sudden defendant said, "Oh, Tree, I feel sick"—defendant's wife's name is Theresa, and he calls her Tree. His wife looked over, and defendant had fainted. "His head had fallen back and his hand had left the wheel and I immediately took hold of the wheel with both hands, and then I do not remember anything else until I waked up on the road in a strange automobile." The witness further testified that her husband's eyes were closed when she looked, and that his fainting and the collision occurred in quick sequence to his previous statement, "Oh, Tree, I feel so sick." The defendant himself testified that he had fainted just before the crash, that he had never fainted before, and that so far as he knew he was in good health, that on the day in question he had had breakfast late, and had had no luncheon, but that he was not feeling badly until the moment before the illness and the fainting occurred. * * *

The sole question is whether, under the circumstances we have narrated, the trial court was justified in taking the case from the jury. We think its action was in all respects correct.

It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence. [Cc]

In the present case the positive evidence is all to the effect that defendant did not know and had no reason to think he would be subject to an attack such as overcame him. Hence negligence cannot be predicated in this case upon defendant's recklessness in driving an automobile when he knew or should have known of the possibility of an accident from such an event as occurred.

As the plaintiff wholly failed to show any actionable negligence prior to the time the car left the road, or causing or contributing to that occurrence, and as the defendant's positive and uncontradicted evidence shows that the loss of control was due to defendant's sudden illness, it follows the action of the lower court was right. Even if plaintiff's own evidence tended more strongly than it does to imply some act of negligence, it would be insufficient to sustain a verdict and judgment upon proof such as the defendant offered here of undisputed facts, for in such a case the inference must yield to uncontradicted evidence of actual events.

Affirmed.

NOTES AND QUESTIONS

1. Defendant, asleep on the rear seat of an automobile, unconsciously pushed with his foot against the front seat in which plaintiff, the driver, was sitting. Plaintiff's arms were forced off the wheel, the car crashed into a culvert and overturned, and plaintiff was injured. Is defendant liable? Lobert v. Pack, 337 Pa. 103, 9 A.2d 365 (1939) (defendant not liable because he did not act with volition).

2. Defendant, driving an automobile, fell asleep at the wheel. The car went into the ditch and injured the plaintiff. Is defendant liable for his conduct while he is asleep? What if he knew that he was getting sleepy and continued to drive? Is this not always the case? At least one court has found that falling asleep at the wheel of a car is negligence unless the driver was suddenly overcome with illness. Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925). Defendant became so frightened when she realized that her brakes were not working that she fainted and was thus unconscious when she collided with plaintiff's car. Liability? Kohler v. Sheffert, 250 Iowa 899, 96 N.W.2d 911 (1959) (fact that she was unconscious at time of collision did not excuse previous negligence in causing the situation that frightened her).

3. Knowing that he was subject to epileptic seizures, driver had a seizure while driving and lost control of the car, which ran into the plaintiff and injured him. Is driver liable? Eleason v. Western Casualty & Surety Co., 254 Wis. 134, 35 N.W.2d 301 (1948) (liability based on testimony that driver knew he was subject to "spells" that could render him unconscious even though he did not know he had epilepsy). What if he had never had a seizure before? Moore v. Capital Transit Co., 226 F.2d 57 (D.C.Cir.1955), cert. denied, 350 U.S. 966 (1956) (no liability because never had spell before and no reason to anticipate).

4. A patient was given prescription drugs and discharged from the hospital, without being warned that they would impair his mental and physical abilities. The patient drove his automobile, lost control and struck a tree, injuring his passenger. Is the driver liable to his passenger? Is his doctor? Is the manufacturer of the drugs? Cf. Kirk v. Michael Reese Hospital and Medical Center, 117 Ill.2d 507, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987) and McKenzie v. Hawaii Permanente Medical Group, Inc., 98 Haw. 296, 47 P.3d 1209 (2002).

5. Do you agree with the result of the principal case? What about the argument that anyone who drives an automobile should bear the risk that others will be injured if he suffers a heart attack while driving, and should be liable for their loss? In a case where an epileptic had an unanticipated seizure, plaintiff's counsel argued most strongly that since defendant had liability insurance, he should bear the risk. Do you find this argument for strict liability persuasive? See Hammontree v. Jenner, 20 Cal.App.3d 528, 97 Cal.Rptr. 739 (1971). The court rejected this contention.

Spano v. Perini Corp.

Court of Appeals of New York, 1969.
25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527, on remand,
33 A.D.2d 516, 304 N.Y.S.2d 15 (1969).

FULD, CHIEF JUDGE. The principal question posed on this appeal is whether a person who has sustained property damage caused by blasting on nearby property can maintain an action for damages without a showing that the blaster was negligent. Since 1893, when this court decided the case of Booth v. Rome, W. & O.T.R.R. Co., 140 N.Y. 267, 35 N.E. 592, 24 L.R.A. 105, it has been the law of this State that proof of negligence was required unless the blast was accompanied by an actual physical invasion of the damaged property—for example, by rocks or other material being cast upon the premises. We are now asked to reconsider that rule.

The plaintiff Spano is the owner of a garage in Brooklyn which was wrecked by a blast occurring on November 27, 1962. There was then in that garage, for repairs, an automobile owned by the plaintiff Davis which he also claims was damaged by the blasting. Each of the plaintiffs brought suit against the two defendants who, as joint venturers, were engaged in constructing a tunnel in the vicinity pursuant to a contract with the City of New York. The two cases were tried together, without a jury, in the Civil Court of the City of New York, New York County, and judgments were rendered in favor of the plaintiffs. The judgments were reversed by the Appellate Term and the Appellate Division affirmed that order, granting leave to appeal to this court.

It is undisputed that, on the day in question (November 27, 1962), the defendants had set off a total of 194 sticks of dynamite at a construction site which was only 125 feet away from the damaged premises. Although both plaintiffs alleged negligence in their complaints, no attempt was made to show that the defendants had failed to exercise reasonable care or to take necessary precautions when they were blasting. Instead, they chose to rely, upon the trial, solely on the principle of absolute liability * * *

The concept of absolute liability in blasting cases is hardly a novel one. The overwhelming majority of American jurisdictions have adopted such a rule. [Cc] Indeed, this court itself, several years ago, noted that a change in our law would "conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass". [C]

We need not rely solely however upon out-of-state decisions in order to attain our result. Not only has the rationale of the *Booth* case [c] been overwhelmingly rejected elsewhere but it appears to be fundamentally inconsistent with earlier cases in our own court which had held, long before *Booth* was decided, that a party was absolutely liable for damages to neighboring property caused by explosions. (See, e.g., Hay v. Cohoes Co., 2 N.Y. 159; Heeg v. Licht, 80 N.Y. 579.) In the *Hay* case (2 N.Y. 159, supra), for example, the defendant was engaged in blasting an excavation for a canal and the force of the blasts caused large quantities of earth and stones to be thrown against the plaintiff's house, knocking down his stoop and part of his chimney. The court held the defendant *absolutely* liable for the damage caused * * *

Although the court in *Booth* drew a distinction between a situation—such as was presented in the *Hay* case—where there was "a physical invasion" of, or trespass on, the plaintiff's property and one in which the damage was caused by "setting the air in motion, or in some other unexplained way," [c], it is clear that the court, in the earlier cases, was not concerned with the particular manner by which the damage was caused but by the simple fact that any explosion in a built-up area was likely to cause damage. Thus, in Heeg v. Licht, 80 N.Y. 579, the court held that there should be absolute liability where the damage was caused by the accidental explosion of stored gunpowder, even in the absence of a physical trespass (p. 581):

"The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. * * * The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, * * * In such a case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application."

Such reasoning should, we venture, have led to the conclusion that the *intentional* setting off of explosives—that is, blasting—in an area in which it was likely to cause harm to neighboring property similarly results in absolute liability. However, the court in the *Booth* case rejected such an extension of the rule for the reason that "[t]o exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other" [c]. The

court expanded on this by stating, "This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this."

This rationale cannot withstand analysis. The plaintiff in *Booth* was not seeking, as the court implied, to "exclude the defendant from blasting" and thus prevent desirable improvements to the latter's property. Rather, he was merely seeking compensation for the damage which was inflicted upon his own property as a result of that blasting. The question, in other words, was not *whether* it was lawful or proper to engage in blasting but *who* should bear the cost of any resulting damage—the person who engaged in the dangerous activity or the innocent neighbor injured thereby. Viewed in such a light, it clearly appears that *Booth* was wrongly decided and should be forthrightly overruled * * *

[The court here considered the evidence of causation of the plaintiffs' damage, and concluded that it was sufficient.]

Even though the proof was not insufficient as a matter of law, however, the Appellate Division affirmed on the sole ground that no negligence had been proven against the defendants and thus had no occasion to consider the question whether, in fact, the blasting caused the damage. That being so, we must remit the case to the Appellate Division so that it may pass upon the weight of the evidence. [Cc]

The order appealed from should be reversed, with costs, and the matter remitted to the Appellate Division for further proceedings in accordance with this opinion.

NOTES AND QUESTIONS

1. The early common law strict liability of the Weaver v. Ward type has persisted stubbornly in connection with trespass to real property and has been exorcised only in contemporary times. Thus, in Randall v. Shelton, 293 S.W.2d 559 (Ky.1956), defendant's truck ran over a large stone in the gravel highway and the tire cast it out so that it hit plaintiff, who was standing in her yard, and injured her. The appellate court found no negligence and held that the defendant's motion for judgment notwithstanding the verdict should have been granted. To do this, it had to overrule an earlier Kentucky case in which a runaway street car invaded plaintiff's property and did damage. The special rule for trespass explains some of the early New York cases discussed in the opinion of the principal case.

2. The procedural distinction long made in New York, between an action of trespass for blasting causing physical invasion by casting rocks on the plaintiff's land, for which there was strict liability, and the action of nuisance for vibration or concussion which shook plaintiff's house to pieces, which would require proof of negligence, was denounced as a marriage of procedural technicality with scientific ignorance. This distinction, abandoned by New York in the principal case, has lost its significance in states that apply strict liability to blasting operations because blasting is an abnormally dangerous activity. See, e.g., Stocks v. CFW Construction Co., Inc., 472 So.2d 1044 (Ala.1985). The question of strict liability for damage to land by blasting and other activities that have been deemed extrahazardous or abnormally dangerous is considered at greater length in Chapter 14.

3. For the present, it is sufficient to note that this case represents one type of situation in which strict liability may be applied, without any showing of intent or negligence, by the majority of the courts that have considered the question. This has sometimes been called absolute liability, or liability without fault. The first Restatement of Torts § 519 (1938) conferred the name of "ultrahazardous activities" upon these cases. The drafters of Restatement (Second) of Torts § 519 (1977) concluded that a better name is "abnormally dangerous activities," since the emphasis is more upon the abnormal character of what the defendant does in relation to the surroundings than upon the high degree of danger. That label was retained by the drafters of Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (2010).

4. Strict liability also has been imposed upon manufacturers of products when defects in their wares have caused injury. This position is now generally followed when the defect causing the injury is due to an error in the manufacturing process. There is less agreement as to the application of strict liability for failure to use a safer design or to warn of dangers. This application of strict liability to products liability is discussed in Chapter 15.

5. Strict liability involves a good many issues that are to be considered later in Chapters 14 and 15. For present purposes, note merely that there are three possible bases of tort liability:

A. Intentional conduct.

B. Negligent conduct that creates an unreasonable risk of causing harm.

C. Conduct that is neither intentional nor negligent but that subjects the actor to strict liability because of public policy.

6. These will be considered in turn, which will carry us through Chapter 15. The remainder of this book covers particular fields of case law in which special problems arise, and in most of which intent, negligence, and strict liability are all involved and intermingled as possible bases for recovery.

CHAPTER II

INTENTIONAL INTERFERENCE WITH PERSON OR PROPERTY

1. INTENT

Garratt v. Dailey

Supreme Court of Washington, 1955.
46 Wash.2d 197, 279 P.2d 1091.

HILL, JUSTICE. The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

"III. * * * that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

"IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey moved the chair in question *he did not have any wilful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose,*

intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff." (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be $11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions, [c] state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. * * *

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries. * * *

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. * * *

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a) of § 13, the Restatement says:

"*Character of Actor's Intention.* In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced." [C]

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. [Cc]

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (i.e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from [Restatement, (First) Torts, 29, § 13]:

"It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section."

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. [C] Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. [C] If Brian did not have such knowledge, there was no wrongful act by him and the basic premise of liability on the theory of a battery was not established.

It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for $11,000 in her favor on the record now before us.

Nor do we find any error in the record that warrants a new trial. * * *

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it. * * *

Remanded for clarification.

[On remand, the trial judge concluded that it was necessary for him to consider carefully the time sequence, as he had not done before; and this resulted in his finding "that the arthritic woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it, and that he knew, with substantial certainty, at that time that she would attempt to sit in the place where the chair had been." He entered judgment for the plaintiff in the amount of $11,000, which was affirmed on a second appeal in Garratt v. Dailey, 49 Wash.2d 499, 304 P.2d 681 (1956).]

NOTES AND QUESTIONS

1. The trial court judge found that plaintiff suffered damages in the amount of $11,000. For most intentional torts, the court will award nominal damages even if no actual damages were proved. Of course, if the plaintiff does prove actual damages, as she did in this case, defendant is liable for those actual damages. How would Ms. Garratt's lawyer prove actual damages? See Chapter 10, Damages.

2. Note that the trial judge was the finder of fact at both trials. Why do you think his findings of fact were different the second time? Might he have been influenced by the appellate court's view of the facts as well as its pronouncement of the law?

3. Can a child five years and nine months old have an intent to do harm to another? And if so, how can that intent be "fault"? Suppose that a boy of seven, playing with a bow and arrow, aims at the feet of a girl of five but the arrow hits her in the eye. Is he liable? Weisbart v. Flohr, 260 Cal.App.2d 281, 67 Cal.Rptr. 114 (1968) (yes).

4. Can a four-year-old child who strikes his babysitter in the throat, crushing her larynx, be held liable for an intentional tort? Bailey v. C.S., 12 S.W.3d 159 (Tex. App. 2000) (rejecting argument that four-year-old was incapable of intent). What about a two-year-old child who bites an infant? See Fromenthal v. Clark, 442 So.2d 608 (La.App.1983), cert. denied, 444 So.2d 1242 (1984) (affirming trial court ruling that two-year-old was too young to form intent).

5. Some states have parental responsibility statutes that make parents liable for their child's malicious torts. Can a young child commit a tort requiring a "malicious" state of mind? Ortega v. Montoya, 97 N.M. 159, 637 P.2d 841 (1981) (eight-year-old boy *could* be capable of willful and malicious conduct and it was for jury to determine whether he had acted in such a manner).

Spivey v. Battaglia

Supreme Court of Florida, 1972.
258 So.2d 815.

DEKLE, JUSTICE. * * * Petitioner (plaintiff in the trial court) and respondent (defendant) were employees of Battaglia Fruit Co. on January 21, 1965. During the lunch hour several employees of Battaglia Fruit Co., including petitioner and respondent, were seated on a work table in the plant of the company. Respondent, in an effort to tease petitioner, whom he knew to be shy, intentionally put his arm around petitioner and pulled her head toward him. Immediately after this "friendly unsolicited hug," petitioner

suffered a sharp pain in the back of her neck and ear, and sharp pains into the base of her skull. As a result, petitioner was paralyzed on the left side of her face and mouth.

An action was commenced in the Circuit Court of Orange County, Florida, wherein the petitioners, Mr. and Mrs. Spivey, brought suit against respondent for, (1) negligence, and (2) assault and battery. Respondent, Mr. Battaglia, filed his answer raising as a defense the claim that his "friendly unsolicited hug" was an assault and battery as a matter of law and was barred by the running of the two-year statute of limitations on assault and battery. Respondent's motion for summary judgment was granted by the trial court on this basis. The district court affirmed on the authority of McDonald v. Ford, [223 So.2d 553 (Fla.App.1969)].

The question presented for our determination is whether petitioner's action could be maintained on the negligence count, or whether respondent's conduct amounted to an assault and battery as a matter of law, which would bar the suit under the two-year statute (which had run).

In *McDonald* the incident complained of occurred in the early morning hours in a home owned by the defendant. While the plaintiff was looking through some records, the defendant came up behind her, laughingly embraced her and, though she resisted, kissed her hard. As the defendant was hurting the plaintiff physically by his embrace, the plaintiff continued to struggle violently and the defendant continued to laugh and pursue his love-making attempts. In the process, plaintiff struck her face hard upon an object that she was unable to identify specifically. With those facts before it, the district court held that what actually occurred was an assault and battery, and not negligence. The court quoted with approval from the Court of Appeals of Ohio in Williams v. Pressman, 113 N.E.2d 395, at 396 (Ohio App.1953):

"* * * an assault and battery is not negligence, for such action is intentional, while negligence connotes an unintentional act."

The intent with which such a tort liability as assault is concerned is not necessarily a hostile intent, or a desire to do harm. Where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it. It would thus be an assault (intentional). However, the knowledge and appreciation of a *risk,* short of substantial certainty, is not the equivalent of intent. Thus, the distinction between intent and negligence boils down to a matter of degree. "Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid (negligence), and becomes a substantial certainty." In the latter case, the intent is legally implied and becomes an assault rather than unintentional negligence.

The distinction between the unsolicited kisses in *McDonald,* supra, and the unsolicited hug in the present case turns upon this question of intent. In *McDonald,* the court, finding an assault and battery, necessarily had to find initially that the results of the defendant's acts were "intentional."

This is a rational conclusion in view of the struggling involved there. In the instant case, the DCA must have found the same intent. But we cannot agree with that finding in these circumstances. It cannot be said that a reasonable man in this defendant's position would believe that the bizarre results herein were "substantially certain" to follow. This is an unreasonable conclusion and is a misapplication of the rule in *McDonald*. This does not mean that he does not become liable for such unanticipated results, however. The settled law is that a defendant becomes liable for reasonably foreseeable consequences, though the exact results and damages were not contemplated.

Acts that might be considered prudent in one case might be negligent in another. Negligence is a relative term and its existence must depend in each case upon the particular circumstances which surrounded the parties at the time and place of the events upon which the controversy is based.

The trial judge committed error when he granted summary final judgment in favor of the defendant. The cause should have been submitted to the jury with appropriate instructions regarding the elements of negligence. Accordingly, certiorari is granted; the decision of the district court is hereby quashed and the cause is remanded with directions to reverse the summary final judgment.

It is so ordered.

NOTES AND QUESTIONS

1. *Distinguish*:

A. The intent to do an act. The defendant throws a rock.

B. The intent to bring about the consequences of the act. The rock hits someone. Liability for intentional torts is premised on the intent to bring about the consequences (e.g., for battery, a touching that is harmful or offensive).

C. The intent to bring about a specific harm (e.g., broken leg). This is sufficient to establish intent, but not necessary.

D. The intent to do an act with actual knowledge on the part of the actor that the consequences (e.g., touching that is harmful or offensive) are substantially certain to follow. This is sufficient to establish intent.

E. The intent to do an act with knowledge on the part of the actor that he is risking particular consequences. This is not sufficient to establish intent—although it may be negligence if the risk is an unreasonable one under the circumstances.

2. *Distinguish*:

A. The defendant does not act. He is carried onto plaintiff's land against his will. Smith v. Stone, Style 65, 82 Eng.Rep. 533 (1647) (no liability).

B. He acts intentionally, but under fear or threats. Twelve armed men compel him to enter plaintiff's land and steal a horse. Gilbert v. Stone, Style 72, 82 Eng.Rep. 539 (1648) (liability).

C. He acts intentionally, but without any desire to affect the plaintiff, or any certainty that he will do so. He rides a horse, which runs away with him and runs the plaintiff down. Gibbons v. Pepper, 1 Ld.Raym. 38, 91 Eng.Rep. 922 (1695) (no

liability if someone else struck the horse; liability if defendant's spurring caused runaway).

D. He acts with the desire to affect the plaintiff, but for an entirely permissible or laudable purpose. He shoots the plaintiff in self-defense or while a soldier defending his country. See Chapter 3 (satisfies intent requirement but may result in no liability if conduct is privileged).

3. While standing in line to pay for her purchases, plaintiff was attacked from behind by a mentally handicapped man who grabbed her hair and head and threw her to the ground. In an attempt to fit her claim within negligence, she argued that he was mentally incapable of forming intent to cause harm and thus did not commit a battery. The court rejected her argument, noting that the intentional tort of battery required only acting with intent to cause contact that was harmful or offensive, not acting with intent to cause harm. Wagner v. State, 2005 UT 54, 122 P.3d 599 (2005).

4. It may not seem important to distinguish between negligent and intentionally wrongful conduct: the defendant usually will be held liable to the plaintiff in either situation. Nevertheless, the distinction may be legally significant. Consider the following:

A. Will defendant be liable for punitive damages? See Chapter 10, Section 3.

B. Will the defense of contributory negligence be available to defendant? See page 613, note 7.

C. Will defendant's employer be liable under the doctrine of *respondeat superior*? See page 614, note 3.

D. How far will the law trace the consequences of defendant's wrongful act? See Tate v. Canonica, 180 Cal.App.2d 898, 5 Cal.Rptr. 28 (1960) (more inclined to find defendant's conduct was legal cause of harm if tort was intentional) and R.D. v. W.H., 875 P.2d 26 (Wyo.1994) (court imposes higher degree of responsibility on those who commit intentional act).

E. Will the defendant be reimbursed through a liability insurance policy? See Allstate Ins. Co. v. Hiseley, 465 F.2d 1243 (10th Cir.1972) (applying Oklahoma law) (following an incident outside a bar, one car pursued another at speeds over 100 miles an hour and then bumped it, causing its driver to lose control and crash) and Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 850 N.E.2d 1152, 818 N.Y.S.2d 176 (2006) (insured shot an acquaintance in self defense inside insured's home). Pryor, The Stories We Tell: Intentional Harm and the Quest for Insurance Funding, 75 Tex.L.Rev. 1721 (1997).

F. Has the state statute of limitations run? See the principal case and Baska v. Scherzer, 283 Kan. 750, 156 P.3d 617 (2007) (statute of limitations for intentional tort applies to cause of action brought against two teenagers who hit the mother of one of their friends when the mother stepped between them to stop a fight).

G. Will an employer be subject to liability to an employee in spite of a general worker compensation immunity shield? Some state worker compensation statutes provide an exception to the immunity for intentional wrongdoing. Does an employer's intentional failure to train an employee to perform a dangerous task supply the requisite intent to injure under the worker compensation intentional injury exception? See Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex.1985). What about an employer's deliberate exposure of employees to dangerous products? See Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985) and Bardere v. Zafir, 102 A.D.2d 422, 477 N.Y.S.2d 131, aff'd, 63 N.Y.2d 850, 472 N.E.2d 37, 482

N.Y.S.2d 261 (1984) (plaintiff must show "specific acts [by the employer] directed at causing harm to particular employees").

H. Will the plaintiff be able to bring a cause of action against the United States, which may be liable for the negligent acts of its employees, but not for their intentional acts? See pages 683–684.

5. Do you think that a court's characterization of a defendant's conduct as "negligent" or "intentional" sometimes might be influenced by the legal effect of its finding? Since the court is not bound by either party's characterization of the events, such influence could occur, but only in close cases. At the receiving dock of a meatpacking plant, plaintiff was unloading a truck when a government meat inspector leapt out at him, screamed "boo," pulled his wool stocking cap over his eyes, and jumped on his back. Plaintiff fell forward and struck his face on some meat hooks, severely injuring his mouth and teeth. Plaintiff's complaint was for negligent conduct, apparently because the defendant's employer, the United States, would not be liable for its employee's battery. Cf. Lambertson v. United States, 528 F.2d 441 (2d Cir.1976), cert. denied, 426 U.S. 921 (1976) (court did not permit plaintiff to recover by "dressing up the substance" of battery in the "garments" of negligence).

6. For a discussion of the treatment of intent in English and American tort law, see Finnis, "Intention in Tort Law" in Owen, Philosophical Foundations of Tort Law 229 (Clarenden Press 1995).

Ranson v. Kitner

Appellate Court of Illinois, 1889.
31 Ill.App. 241.

CONGER, J. This was an action brought by appellee against appellants to recover the value of a dog killed by appellants, and a judgment rendered for $50.

The defense was that appellants were hunting for wolves, that appellee's dog had a striking resemblance to a wolf, that they in good faith believed it to be one, and killed it as such.

Many points are made, and a lengthy argument failed to show that error in the trial below was committed, but we are inclined to think that no material error occurred to the prejudice of appellants.

The jury held them liable for the value of the dog, and we do not see how they could have done otherwise under the evidence. Appellants are clearly liable for the damages caused by their mistake, notwithstanding they were acting in good faith.

We see no reason for interfering with the conclusion reached by the jury, and the judgment will be affirmed.

NOTES AND QUESTIONS

1. Did the defendant intend to kill the dog? The court calls it "mistake." Why not accident?

2. Defendant fuel oil distributor had a contract to deliver oil to a residence. One day, during the delivery, the oil overflowed and damaged surrounding lawn and

shrubberies. The tank overflowed because it already had been filled by another company, hired by the new owner. The previous owner apparently had not canceled his contract when he moved. Is the fuel oil distributor liable for trespass? Serota v. M. & M. Utilities, Inc., 55 Misc.2d 286, 285 N.Y.S.2d 121 (1967) (reasonable mistake no defense to trespass).

3. Defendant, seeking to confront the driver who frightened his horses the previous day, pushed back the hat of the wrong man. Does he intend to touch him? Seigel v. Long, 169 Ala. 79, 53 So. 753 (1910). What if a surgeon operates on the wrong patient? Gill v. Selling, 125 Or. 587, 267 P. 812 (1928). Generally, mistake as to the identity of the person or animal does not negate intent. Will the mistake protect the defendant against liability for the result he intended to cause? There is general agreement that it does not where the defendant by mistake appropriates property of the plaintiff. If he is not held liable for his mistake, he would be unjustly enriched. Perry v. Jefferies, 61 S.C. 292, 39 S.E. 515 (1901) (cutting and removing timber from plaintiff's land under a reasonable belief that defendant owned it); Dexter v. Cole, 6 Wis. 319, 70 Am.Dec. 465 (1857) (driving off plaintiff's sheep, believed to be defendant's).

4. On the other hand, some of the defendant's privileges depend, not upon the existence of a fact, but upon the reasonable belief that the fact exists. Defendant, seeing the plaintiff reach for a handkerchief in his pocket, reasonably believes that he is reaching for a gun, and strikes plaintiff to defend himself. See page 105. Mistakes as to the existence of a privilege are dealt with in Chapter 3 in connection with the privilege itself.

McGuire v. Almy

Supreme Judicial Court of Massachusetts, 1937.
297 Mass. 323, 8 N.E.2d 760.

QUA, JUSTICE. This is an action of tort for assault and battery. The only question of law reported is whether the judge should have directed a verdict for the defendant.

The following facts are established by the plaintiff's own evidence: In August, 1930, the plaintiff was employed to take care of the defendant. The plaintiff was a registered nurse and was a graduate of a training school for nurses. The defendant was an insane person. Before the plaintiff was hired she learned that the defendant was a "mental case and was in good physical condition," and that for some time two nurses had been taking care of her. The plaintiff was on "24 hour duty." The plaintiff slept in the room next to the defendant's room. Except when the plaintiff was with the defendant, the plaintiff kept the defendant locked in the defendant's room. * * *

On April 19, 1932, the defendant, while locked in her room, had a violent attack. The plaintiff heard a crashing of furniture and then knew that the defendant was ugly, violent and dangerous. The defendant told the plaintiff and a Miss Maroney, "the maid," who was with the plaintiff in the adjoining room, that if they came into the defendant's room, she would kill them. The plaintiff and Miss Maroney looked into the defendant's room, "saw what the defendant had done," and "thought it best to take the

broken stuff away before she did any harm to herself with it." They sent for a Mr. Emerton, the defendant's brother-in-law. When he arrived the defendant was in the middle of her room about ten feet from the door, holding upraised the leg of a low-boy as if she were going to strike. The plaintiff stepped into the room and walked toward the defendant, while Mr. Emerton and Miss Maroney remained in the doorway. As the plaintiff approached the defendant and tried to take hold of the defendant's hand which held the leg, the defendant struck the plaintiff's head with it, causing the injuries for which the action was brought.

The extent to which an insane person is liable for torts has not been fully defined in this Commonwealth. * * *

Turning to authorities elsewhere, we find that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable. Defamation and malicious prosecution are the torts more commonly mentioned in this connection. * * * These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think, that as a practical matter, there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts, [cc] including a few cases in which the child was so young as to render his capacity for fault comparable to that of many insane persons, [cc]. Fault is by no means at

the present day a universal prerequisite to liability, and the theory that it should be such has been obliged very recently to yield at several points to what have been thought to be paramount considerations of public good. Finally, it would be difficult not to recognize the persuasive weight of so much authority so widely extended.

But the present occasion does not require us either to accept or to reject the prevailing doctrine in its entirety. For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it. * * *

Coming now to the application of the rule to the facts of this case, it is apparent that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent. See American Law Institute Restatement, Torts, §§ 13, 14. We think this was enough. * * *

[The rest of the opinion holds that whether the plaintiff consented to the attack or assumed the risk of it is an issue to be left to the jury. There was no evidence that the defendant had previously attacked any one or made any serious threat to do so. The plaintiff had taken care of the defendant for fourteen months without being attacked. When the plaintiff entered the room the defendant was breaking up the furniture, and it could be found that the plaintiff reasonably feared that the defendant would do harm to herself. Under such circumstances it cannot be ruled as a matter of law that the plaintiff assumed the risk.]

Judgment for the plaintiff on the verdict.

NOTES AND QUESTIONS

1. Can someone who is mentally ill have an intent to do harm to another? And if so, how can such an intent be "fault"? How does the insane person differ from the automobile driver who suffers a heart attack, in Cohen v. Petty, page 10?

2. Note that the tort law standards differ from the criminal law standards for holding the mentally ill responsible for their actions. Polmatier v. Russ, 206 Conn. 229, 537 A.2d 468 (1988) (defendant liable for battery of plaintiff's decedent even though he was found not guilty by reason of insanity in criminal case arising *out of* same incident); Delahanty v. Hinckley, 799 F.Supp. 184 (D.D.C. 1992) (rejecting defendant's argument that he should not be liable to plaintiff police officer who was injured when defendant shot at President Reagan because he was in a "deluded and psychotic state of mind" and found not guilty by reason of insanity in criminal case).

3. Despite criticism, the American decisions are unanimous in their agreement with the principal case. Mentally disabled persons may be held responsible for their intentional torts as long as plaintiff can prove that they formed the requisite intent. Restatement (Second) § 895J (1979). See also White v. Muniz, 999 P.2d 814 (Colo. 2000) (in battery claim against defendant with Alzheimer's, plaintiff must prove defendant desired to cause contact that was offensive or harmful).

4. Mental illness may prevent the specific kind of intent necessary for certain torts, such as deceit, that require the plaintiff to prove that the defendant knew that he was not speaking the truth. See Irvine v. Gibson, 117 Ky. 306, 77 S.W. 1106 (1904); Chaddock v. Chaddock, 130 Misc. 900, 226 N.Y.S. 152 (1927); Beaubeauf v. Reed, 4 La.App. 344 (1926).

5. An action also may lie against persons responsible for caring for the mentally ill person, based on negligent supervision, but only if a caretaking responsibility has been assumed. Familial relationship only is not enough. Rausch v. McVeigh, 105 Misc.2d 163, 431 N.Y.S.2d 887 (1980) (cause of action for negligent supervision against parents of 22–year–old autistic son who attacked his therapist); Shirdon v. Houston, 2006 WL 2522394 (Ohio App.) (no duty to supervise adult son even though father knew his son could be aggressive and combative); and Kaminski v. Town of Fairfield, 216 Conn. 29, 578 A.2d 1048 (1990) (accord).

6. Several jurisdictions have carved out a narrow exception to this general rule, holding that an institutionalized mentally disabled patient who cannot control or appreciate the consequences of his conduct cannot be held liable for injuries caused to those employed to care for the patient. The jurisdictions that have addressed this issue have done so both in the context of intentional torts and negligence. Gould v. American Family Mutual Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (1996) (negligence action brought against patient with Alzheimer's); Creasy v. Rusk, 730 N.E.2d 659 (Ind. 2000) (same); Anicet v. Gant, 580 So.2d 273 (Fla.App. 1991) (assault and battery against twenty-three-year-old man suffering from "irremediable mental difficulties" who was unable to control himself from acts of violence).

7. *Intoxication.* What if the defendant is intoxicated? Does intoxication preclude a showing of intent? Bar patron passed out or fell asleep at bar and other patrons agreed to drive him home. Bar employee helped him from bar and was putting him into the back seat of a car when he began shouting obscenities and kicked the employee in the face, seriously injuring him. Sufficient intent for battery? Janelsins v. Button, 102 Md.App. 30, 648 A.2d 1039 (1994) (voluntary intoxication does not vitiate intent).

Talmage v. Smith

Supreme Court of Michigan, 1894.
101 Mich. 370, 59 N.W. 656.

MONTGOMERY, J. The plaintiff recovered in an action of trespass. The case made by plaintiff's proofs was substantially as follows: * * * Defendant had on his premises certain sheds. He came up to the vicinity of the sheds, and saw six or eight boys on the roof of one of them. He claims that he ordered the boys to get down, and they at once did so. He then passed around to where he had a view of the roof of another shed, and saw two boys on the roof. The defendant claims that he did not see the plaintiff, and the proof is not very clear that he did, although there was some testimony from which

it might have been found that he was within his view. Defendant ordered the boys in sight to get down, and there was testimony tending to show that the two boys in defendant's view started to get down at once. Before they succeeded in doing so, however, defendant took a stick, which is described as being two inches in width, and of about the same thickness, and about 16 inches long, and threw it in the direction of the boys; and there was testimony tending to show that it was thrown at one of the boys in view of the defendant. The stick missed him, and hit the plaintiff just above the eye with such force as to inflict an injury which resulted in the total loss of the sight of the eye. * * * George Talmage, the plaintiff's father, testifies that defendant said to him that he threw the stick, intending it for Byron Smith,—one of the boys on the roof,—and this is fully supported by the circumstances of the case. * * *

The circuit judge charged the jury as follows: "If you conclude that Smith did not know the Talmage boy was on the shed, and that he did not intend to hit Smith, or the young man that was with him, but simply, by throwing the stick, intended to frighten Smith, or the other young man that was there, and the club hit Talmage, and injured him, as claimed, then the plaintiff could not recover. If you conclude that Smith threw the stick or club at Smith, or the young man that was with Smith,—intended to hit one or the other of them,—and you also conclude that the throwing of the stick or club was, under the circumstances, reasonable, and not excessive, force to use towards Smith and the other young man, then there would be no recovery by this plaintiff. But if you conclude from the evidence in this case that he threw the stick, intending to hit Smith, or the young man with him,—to hit one of them,—and that that force was unreasonable force, under all the circumstances, then [the defendant] would be doing an unlawful act, if the force was unreasonable, because he had no right to use it. He would be liable then for the injury done to this boy with the stick. * * * "[The jury rendered a verdict for the plaintiff.]

We think the charge is a very fair statement of the law of the case. * * * The right of the plaintiff to recover was made to depend upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon some one. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility. * * *

The judgment will be affirmed, with costs.

NOTES AND QUESTIONS

1. This doctrine of "transferred intent" was derived originally from the criminal law and dates back to the time when tort damages were awarded as a side issue in criminal prosecutions. It is familiar enough in the criminal law, and has been applied in many tort cases where the defendant has shot at A, struck at him, or thrown a punch or rock at him, and unintentionally hit B instead. See, for example, Lopez v. Surchia, 112 Cal.App.2d 314, 246 P.2d 111 (1952) (shooting); Carnes v. Thompson, 48 S.W.2d 903 (Mo.1932) (striking with pliers); Baska v. Scherzer, 283 Kan. 750, 156 P.3d 617 (2007) (while throwing punches at each other,

teenagers hit a woman who stepped between them to stop the fight); Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440 (1956) (throwing a rock).

2. The doctrine is discussed in Prosser, Transferred Intent, 45 Tex.L.Rev. 650 (1967). The conclusion there is that it applies whenever both the tort intended and the resulting harm fall within the scope of the old action of trespass—that is, where both involve direct and immediate application of force to the person or to tangible property. There are five torts that fell within the trespass writ: battery, assault, false imprisonment, trespass to land, and trespass to chattels. When the defendant intends any one of the five, and accomplishes any one of the five, the doctrine applies and the defendant is liable, even if the plaintiff was not the intended target.

3. Thus he is liable when he shoots to frighten A (assault) and the bullet unforeseeably hits a stranger (battery). Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961); Hall v. McBryde, 919 P.2d 910 (Colo.App.1996) (firing at passing car and hitting neighbor). Or when he shoots at a dog (trespass to chattels) and hits a boy scout (battery). Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869 (1930). What if defendant, believing a house to be empty, intends arson (trespass to chattels) and accomplishes battery (sleeping man killed by smoke inhalation)? Cf. Lewis v. Allstate Ins. Co., 730 So.2d 65 (Miss. 1998).

4. On the other hand, when either the tort intended or the one accomplished does not fall within the trespass action, the doctrine does not apply. Clark v. Gay, 112 Ga. 777, 38 S.E. 81 (1901) (defendant committed murder in plaintiff's house and plaintiff sought value of house because his family refused to live there after the murder); McGee v. Vanover, 148 Ky. 737, 147 S.W. 742 (1912) (defendant inflicted beating on A, causing mental distress to plaintiff bystander).

2. BATTERY

Cole v. Turner

Nisi Prius, 1704.
6 Modern Rep. 149, 90 Eng.Rep. 958.

At Nisi Prius, upon evidence in trespass for assault and battery, Holt, C.J., declared:

1. That the least touching of another in anger is a battery.

2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently it will be no battery.

3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery.

NOTES AND QUESTIONS

1. In United States v. Ortega, 4 Wash.C.C. 531, 27 Fed.Cas. 359 (E.D.Pa. 1825), defendant approached the plaintiff in an offensive manner, took hold of the breast of his coat, and said that he demanded satisfaction. Is this a battery?

2. What about spitting in the plaintiff's face? Alcorn v. Mitchell, 63 Ill. 553 (1872). Or forcibly removing his hat? Seigel v. Long, 169 Ala. 79, 53 So. 753 (1910). Or an attempted search of his pockets? Piggly-Wiggly Alabama Co. v. Rickles, 212 Ala. 585, 103 So. 860 (1925). Or touching her private parts? Skousen v. Nidy, 90

Ariz. 215, 367 P.2d 248 (1961). Cf. Gates v. State, 110 Ga.App. 303, 138 S.E.2d 473 (1964) (stranger touching woman on the buttocks).

3. What about tapping plaintiff on the shoulder to attract his attention? "Pardon me, sir, could you direct me, etc."? Coward v. Baddeley, 4 H. & N. 478, 157 Eng.Rep. 927 (1859).

Wallace v. Rosen

Court of Appeals of Indiana, 2002.
765 N.E.2d 192.

KIRSCH, J. Mable Wallace appeals the jury verdict in favor of Indianapolis Public Schools (IPS) and Harriet Rosen, a teacher for IPS. On appeal, Wallace raises the following issues:

I. Whether the trial court erred in refusing to give her tendered jury instruction regarding battery. * * *

We affirm.

FACTS AND PROCEDURAL HISTORY

[Rosen was a teacher at Northwest High School in Indianapolis. On April 22, 1994, the high school had a fire drill while classes were in session. The drill was not previously announced to the teachers and occurred just one week after a fire was extinguished in a bathroom near Rosen's classroom. On the day the alarm sounded, Wallace, who was recovering from foot surgery, was at the high school delivering homework to her daughter Lalaya. Wallace saw Lalaya just as Wallace neared the top of a staircase and stopped to speak to her. Two of Lalaya's friends also stopped to talk. Just then, the alarm sounded and students began filing down the stairs while Wallace took a step or two up the stairs to the second floor landing. As Rosen escorted her class to the designated stairway she noticed three or four people talking together at the top of the stairway and blocking the students' exit. Rosen did not recognize any of the individuals but approached "telling everybody to move it." Wallace, with her back to Rosen, was unable to hear Rosen over the noise of the alarm and Rosen had to touch her on the back to get her attention. Rosen then told Wallace, "you've got to get moving because this is a fire drill." At trial, Wallace testified that Rosen pushed her and she slipped and fell down the stairs. Rosen denied pushing Wallace, but admitted touching her back. At the close of the trial, the trial court judge refused to give the jury an instruction concerning civil battery that was requested by plaintiff. The jury found in favor of IPS and Rosen on the negligence count, and Wallace appealed.]

DISCUSSION AND DECISION

* * *

I. Battery Instruction

Wallace first argues that it was error for the trial court to refuse to give the jury the following tendered instruction pertaining to battery:

> A battery is the knowing or intentional touching of one person by another in a rude, insolent, or angry manner.
>
> Any touching, however slight, may constitute an assault and battery.
>
> Also, a battery may be recklessly committed where one acts in reckless disregard of the consequences, and the fact the person does not intend that the act shall result in an injury is immaterial. * * *

The Indiana Pattern Jury Instruction for the intentional tort of civil battery is as follows: "A battery is the knowing or intentional touching of a person against [his] [her] will in a rude, insolent, or angry manner." 2 Indiana Pattern Jury Instructions (Civil) 31.03 (2d ed. Revised 2001).[2] Battery is an intentional tort.[C] In discussing intent, Professors Prosser and Keeton made the following comments:

> In a loose and general sense, the meaning of "intent" is easy to grasp. As Holmes observed, even a dog knows the difference between being tripped over and being kicked. This is also the key distinction between two major divisions of legal liability—negligence and intentional torts....
>
> It is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been. Thus, ... the defendant on a bicycle who rides down a person in full view on a sidewalk where there is ample room to pass may learn that the factfinder (judge or jury) is unwilling to credit the statement, "I didn't mean to do it."
>
> On the other hand, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has to be drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.
>
> The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good. W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 8, at 33, 36–37 (5th ed.1984) (footnotes omitted).

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2. The Indiana Pattern Jury Instructions are prepared under the auspices of the Indiana Judges Association and the Indiana Judicial Conference Criminal and Civil Instruction Committees. Although not formally approved for use, they are tacitly recognized by Indiana Trial Rule 51(E). [C]

[Witnesses] testified that Rosen touched Wallace on the back causing her to fall down the stairs and injure herself. For battery to be an appropriate instruction, the evidence had to support an inference not only that Rosen intentionally touched Wallace, but that she did so in a rude, insolent, or angry manner, i.e., that she intended to invade Wallace's interests in a way that the law forbids.

Professors Prosser and Keeton also made the following observations about the intentional tort of battery and the character of the defendant's action: "In a crowded world, a certain amount of personal contact is inevitable and must be accepted. *Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention*, a friendly grasp of the arm, or a casual jostling to make a passage. . . ."

The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties. A stranger is not to be expected to tolerate liberties which would be allowed by an intimate friend. But unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive as to personal dignity. KEETON et al., § 9, at 42 (emphasis added). * * *

[The court quoted from the trial transcript concerning the nature of the touching.]

Viewed most favorably to the trial court's decision refusing the tendered instruction, the foregoing evidence indicates that Rosen placed her fingertips on Wallace's shoulder and turned her 90 degrees toward the exit in the midst of a fire drill. The conditions on the stairway of Northwest High School during the fire drill were an example of Professors Prosser and Keeton's "crowded world." Individuals standing in the middle of a stairway during the fire drill could expect that a certain amount of personal contact would be inevitable. Rosen had a responsibility to her students to keep them moving in an orderly fashion down the stairs and out the door. Under these circumstances, Rosen's touching of Wallace's shoulder or back with her fingertips to get her attention over the noise of the alarm cannot be said to be a rude, insolent, or angry touching. Wallace has failed to show that the trial court abused its discretion in refusing the battery instruction. * * *

[Other issues raised by the appeal were then discussed.]

Affirmed. [The concurring opinions are omitted.]

NOTES AND QUESTIONS

1. Has the law of battery undergone any substantial changes since Cole v. Turner in 1704?

2. Do you agree that there was not enough evidence to let the jury decide whether the touching was offensive? The concurring opinion notes that there was

testimony that the teacher had grabbed plaintiff's arm or shoulder to turn her around and that when plaintiff told her she was a parent, the teacher responded, "I don't care who you are, move it."

3. Note that the court refers to Indiana's pattern jury instruction on battery. Many jurisdictions have pattern or sample instructions that are available to the parties to use in requesting the instructions for their particular cases.

4. In the principal case, in a section omitted from this excerpt, the court noted that the third paragraph of the proposed instruction—that battery may be recklessly committed—was not an accurate statement of Indiana law and could have misled or confused the jury under the facts of the case. The court's discussion of the intent requirement makes it clear that it is an essential element. With the modern shift of emphasis to intent and negligence, as distinguished from trespass and case, "battery" has become exclusively an intentional tort. Thus there is no battery when defendant negligently, or even recklessly, drives his car into plaintiff and injures him, without intending to hit him. Cook v. Kinzua Pine Mills Co., 207 Or. 34, 293 P.2d 717 (1956). The same shift of emphasis accounts for the modern cases allowing recovery when the contact inflicted is not direct and immediate, but indirect.

RESTATEMENT (SECOND) OF TORTS (1965)

"§ 13. Battery: Harmful Contact

"An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

"(b) a harmful contact with the person of the other directly or indirectly results."

"§ 18. Battery: Offensive Contact

"(1) An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

"(b) an offensive contact with the person of the other directly or indirectly results.

"(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm."

NOTES AND QUESTIONS

1. When defendant intentionally causes plaintiff to undergo an offensive contact and the resulting injuries are more extensive than a reasonable person might have anticipated, the defendant will still be liable for those injuries. See

Baldinger v. Banks, 26 Misc.2d 1086, 201 N.Y.S.2d 629 (1960) (six-year-old boy shoves four-year-old girl) (broken elbow); Harrigan v. Rosich, 173 So.2d 880 (La.App.1965) (defendant, wishing to get rid of the plaintiff, pushed him with his finger, and said, "Go home, old man.") (detached retina).

2. In Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), one schoolboy, during a class hour, playfully kicked another on the shin. He intended no harm, and the touch was so slight that the plaintiff did not actually feel it. It had, however, the effect of "lighting up" an infection in the leg from a previous injury, and as a result the plaintiff suffered damages found by the jury to be $2,500. The court found liability for battery even though the injury could not have been foreseen. The case is entertainingly and exhaustively discussed in Zile, Vosburg v. Putney: A Centennial Story, [1992] Wis.L.Rev. 877 (1992).

3. Does it make any difference if the defendant is trying to help the plaintiff? In Clayton v. New Dreamland Roller Skating Rink, Inc., 14 N.J.Super. 390, 82 A.2d 458 (1951), cert. denied, 13 N.J. 527, 100 A.2d 567 (1953), plaintiff fell at a skating rink and broke her arm. Over the protests of plaintiff and her husband, defendant's employees, one of whom was a prize fight manager who had first aid experience, proceeded to manipulate the arm in an attempt to set it. Is this battery?

4. While her husband was helping her get dressed in her hospital room the day after her back surgery, patient found a washable tattoo of a rose on her lower abdomen. Surgeon says he had placed it there to improve her spirits and help her heal and that none of his other patients had complained. Patient is very upset. Does she have a cause of action for battery? If so, what would her damages be? See Don Sapatkin, "Surgeon Sued for Giving Anesthetized Patient Temporary Tattoo," The Philadelphia Inquirer, July 16, 2008, at B1, available at 2008 WLNR 13274435.

5. Can the plaintiff make the defendant liable for contact that would not be offensive to a reasonable person, such as a tap on the shoulder to attract attention, by specifically forbidding that conduct? The Restatement (Second) of Torts § 19, leaves the question open. See Richmond v. Fiske, 160 Mass. 34, 35 N.E. 103 (1893), where defendant, against orders, entered plaintiff's bedroom and woke him up to present a milk bill. This was held to be battery, but no doubt it would be offensive to a reasonable person.

6. Can there be liability for battery for a contact of which plaintiff is unaware at the time? Did Sleeping Beauty have a cause of action against Prince Charming? What if an unauthorized surgical operation is performed while plaintiff is under an anaesthetic? Does it make any difference whether the operation is harmful or beneficial? See Mohr v. Williams, page 95.

7. Does the exposure to a virus, such as herpes, through sexual activity constitute a battery? Does consent to the sexual activity operate as a defense? See Doe v. Johnson, 817 F.Supp. 1382 (W.D.Mich.1993) (battery action alleged in transmission of HIV; consent to intercourse does not bar action). Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law, 70 Cornell L.Rev. 101 (1984).

8. Does a mortician who embalms a body unaware that it was infected with the AIDS virus have a cause of action for battery? Cf., Funeral Services by Gregory v. Bluefield Community Hospital, 186 W.Va. 424, 413 S.E.2d 79 (1991). What about the patients of a dentist who does not disclose he has AIDS? What if the dentist always wore gloves during treatment procedures? Would the reasonable person find such touching offensive? See Brzoska v. Olson, 668 A.2d 1355 (Dela. 1995).

Fisher v. Carrousel Motor Hotel, Inc.

Supreme Court of Texas, 1967.
424 S.W.2d 627.

[Action for assault and battery. Plaintiff, a mathematician employed by NASA, was attending a professional conference on telemetry equipment at defendant's hotel. The meeting included a buffet luncheon. As plaintiff was standing in line with others, he was approached by one of defendant's employees, who snatched the plate from his hand, and shouted that a "Negro could not be served in the club." Plaintiff was not actually touched, and was in no apprehension of physical injury; but he was highly embarrassed and hurt by the conduct in the presence of his associates. The jury returned a verdict for $400 actual damages for his humiliation and indignity, and $500 exemplary (punitive) damages in addition. The trial court set aside the verdict and gave judgment for the defendants notwithstanding the verdict. This was affirmed by the Court of Civil Appeals. Plaintiff appealed to the Supreme Court.]

GREENHILL, JUSTICE * * * Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." Morgan v. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941).

Such holding is not unique to the jurisprudence of this State. In S.H. Kress & Co. v. Brashier, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed "an assault or trespass upon the person" by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant "dispossessed plaintiff of the book" and caused her to suffer "humiliation and indignity."

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement (Second) of Torts § 18 (Comment p. 31) as follows:

> "Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person."

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages. * * *

Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Restatement (Second) of Torts § 18. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. [Cc]. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury. [The court then held that the defendant corporation was liable for the tort of its employee.]

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

NOTES AND QUESTIONS

1. What if the plate had been snatched without a racial epithet? Or, suppose the waiter had not touched plaintiff's plate, but said in a loud voice, "Get out, we don't serve Negroes here!"? What if the doorman at the hotel shouted a racial epithet and kicked plaintiff's car when he was about to leave. Battery? Cf. Van Eaton v. Thon, 764 S.W.2d 674 (Mo.App.1988) (defendant struck horse plaintiff was riding).

2. Does the utilization of the tort of battery confuse things? Why not characterize what happened as "intentional infliction of emotional harm"? Might the case be regarded as one of imaginative lawyering, assuming the state was not ready to recognize intentional infliction of emotional harm as a tort? What other remedies might have been available to plaintiff? Compare this with the *State Rubbish Collectors* case, page 51.

3. Defendant, unreasonably suspecting the plaintiff of shoplifting, forcibly seized a package from under her arm and opened it. Morgan v. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941). Defendant deliberately blew pipe smoke in plaintiff's face, knowing she was allergic to it. Richardson v. Hennly, 209 Ga.App. 868, 434 S.E.2d 772 (1993), rev'd on other grounds, 264 Ga. 355, 444 S.E.2d 317 (1994).

4. A is standing with his arm around B's shoulder and leaning on him. C, passing by, violently jerks B's arm, as a result of which A falls down. To whom is C liable for battery? Reynolds v. Pierson, 29 Ind.App. 273, 64 N.E. 484 (1902).

3. ASSAULT

I de S et ux. v. W de S

At the Assizes, 1348.
Y.B.Lib.Ass. folio 99, placitum 60.

I de S and M, his wife, complain of W de S concerning this, that the said W, in the year, etc., with force and arms did make an assault upon the

said M de S and beat her. And W pleaded not guilty. And it was found by the verdict of the inquest that the said W came at night to the house of the said I and sought to buy of his wine, but the door of the tavern was shut and he beat upon the door with a hatchet which he had in his hand, and the wife of the plaintiff put her head out of the window and commanded him to stop, and he saw and he struck with the hatchet but did not hit the woman. Whereupon the inquest said that it seemed to them that there was no trespass since no harm was done.

THORPE, C.J. There is harm done and a trespass for which he shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm. Wherefore tax the damages, etc. And they taxed the damages at half a mark. Thorpe awarded that they should recover their damages, etc., and that the other should be taken. And so note that for an assault a man shall recover damages, etc.

NOTES AND QUESTIONS

1. This is the great-grandparent of all assault cases. Why allow the action if "no harm was done"?

Western Union Telegraph Co. v. Hill

Court of Appeals of Alabama, 1933.
25 Ala.App. 540, 150 So. 709.

Action for damages for assault by J.B. Hill against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

SAMFORD, JUDGE. The action in this case is based upon an alleged assault on the person of plaintiff's wife by one Sapp, an agent of defendant in charge of its office in Huntsville, Ala. The assault complained of consisted of an attempt on the part of Sapp to put his hand on the person of plaintiff's wife coupled with a request that she come behind the counter in defendant's office, and that, if she would come and allow Sapp to love and pet her, he "would fix her clock."

The first question that addresses itself to us is, Was there such an assault as will justify an action for damages? * * *

While every battery includes an assault, an assault does not necessarily require a battery to complete it. What it does take to constitute an assault is an unlawful attempt to commit a battery, incomplete by reason of some intervening cause; or, to state it differently, to constitute an actionable assault there must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented. * * *

What are the facts here? Sapp was the agent of defendant and the manager of its telegraph office in Huntsville. Defendant was under contract with plaintiff to keep in repair and regulated an electric clock in plaintiff's

place of business. When the clock needed attention, that fact was to be reported to Sapp, and he in turn would report to a special man, whose duty it was to do the fixing. At 8:13 o'clock p.m. plaintiff's wife reported to Sapp over the phone that the clock needed attention, and, no one coming to attend the clock, plaintiff's wife went to the office of defendant about 8:30 p.m. There she found Sapp in charge and behind a desk or counter, separating the public from the part of the room in which defendant's operator worked. The counter is four feet and two inches high, and so wide that, Sapp standing on the floor, leaning against the counter and stretching his arm and hand to the full length, the end of his fingers reaches just to the outer edge of the counter. The photographs in evidence show that the counter was as high as Sapp's armpits. Sapp had had two or three drinks and was "still slightly feeling the effects of whisky; I felt all right; I felt good and amiable." When plaintiff's wife came into the office, Sapp came from towards the rear of the room and asked what he could do for her. She replied: "I asked him if he understood over the phone that my clock was out of order and when he was going to fix it. He stood there and looked at me a few minutes and said: 'If you will come back here and let me love and pet you, I will fix your clock.' This he repeated and reached for me with his hand, he extended his hand toward me, he did not put it on me; I jumped back. I was in his reach as I stood there. He reached for me right along here (indicating her left shoulder and arm)." The foregoing is the evidence offered by plaintiff tending to prove assault. Per contra, aside from the positive denial by Sapp of any effort to touch Mrs. Hill, the physical surroundings as evidenced by the photographs of the locus tend to rebut any evidence going to prove that Sapp could have touched plaintiff's wife across that counter even if he had reached his hand in her direction unless she was leaning against the counter or Sapp should have stood upon something so as to elevate him and allow him to reach beyond the counter. However, there is testimony tending to prove that, notwithstanding the width of the counter and the height of Sapp, Sapp could have reached from six to eighteen inches beyond the desk in an effort to place his hand on Mrs. Hill. The evidence as a whole presents a question for the jury. This was the view taken by the trial judge, and in the several rulings bearing on this question there is no error. * * *

[Reversed on the ground that Sapp had not acted within the scope of his employment.]

NOTES AND QUESTIONS

1. Defendant, standing three or four feet from plaintiff, made a "kissing sign" at her by puckering his lips and smacking them. He did not touch her and made no effort to kiss her or to use any force. Is this an assault? Fuller v. State, 44 Tex.Crim. 463, 72 S.W. 184 (1903). Defendant Ku Klux Klan members dressed in KKK robes and carrying guns rode around in a shrimp boat on Galveston Bay from dock to dock frightening Vietnamese fishermen and their families. What would the family members have to prove to recover for assault? See, Vietnamese Fishermen's Ass'n v. Knights of the K.K.K., 518 F.Supp. 993 (S.D.Tex.1981) (applying Texas law).

2. Defendant, a hundred yards from plaintiff, starts running toward him, throwing rocks as he runs. At what point does this become an assault? Cf. State v. Davis, 23 N.C. (1 Ired.) 125, 35 Am.Dec. 735 (1840); Grimes v. State, 99 Miss. 232, 54 So. 839 (1911).

3. What about mere preparation, such as bringing a gun along for an interview? Penny v. State, 114 Ga. 77, 39 S.E. 871 (1901).

4. Although the court uses the term "fear" of an imminent battery, assault requires only apprehension or anticipation. Suppose Hill had a black belt in karate and was contemptuous of Sapp? Assault? Cf. Brady v. Schatzel, [1911] Q.St.R. 206, 208 (police officer testified he was not afraid when defendant pulled a gun on him because he did not believe he would fire it). Why might a lawyer plead and try to prove fear if it is not a necessary element of the tort?

5. Is there an assault if defendant threatens the plaintiff with an unloaded gun? See Allen v. Hannaford, 138 Wash. 423, 244 P. 700 (1926). Suppose the gun remains lying in defendant's lap? See Castiglione v. Galpin, 325 So.2d 725 (La.App. 1976).

6. In State v. Barry, 45 Mont. 598, 124 P. 775 (1912), it was held that there was no assault where the plaintiff did not learn that a gun was aimed at him with intent to shoot him until it was all over. The Restatement (Second) of Torts § 22, has agreed.

7. A major distinction between a criminal assault and an assault in tort is that for criminal assault, a victim need not have an apprehension of contact. A criminal assault occurs if the defendant intends to injure the victim and has the ability to do so. Commonwealth v. Slaney, 345 Mass. 135, 185 N.E.2d 919 (1962). For the tort of assault, the victim must have an apprehension of contact, and it is not necessary that the defendant have the actual ability to carry out the threatened contact. Depending upon the jurisdiction, a defendant could be subject to either criminal prosecution or civil damages, or both.

8. What if the threat is not imminent? Brower v. Ackerley, 88 Wash.App. 87, 943 P.2d 1141, 1145 (1997) (threats of future action—"I'm going to find out where you live and kick your ass" and "you're finished; cut you in your sleep"—not imminent enough to state cause of action for assault.) Does a complaint state a cause of action for assault if one paragraph of the complaint asserts that the defendants threatened to strike the plaintiffs with blackjacks and that the threats placed the plaintiffs in fear that a battery will be committed against them and a subsequent paragraph asserts that the defendants showed the plaintiffs that the defendants were carrying blackjacks? Cucinotti v. Ortmann, 399 Pa. 26, 159 A.2d 216 (1960) ("words in themselves, no matter how threatening, do not constitute an assault").

9. What if these words are accompanied by a threatening gesture? Assault?

A. With his hand upon his sword, "If it were not assize-time, I would not take such language from you." Tuberville v. Savage, 1 Modern Rep. 3 (1699).

B. "Were you not an old man, I would knock you down." State v. Crow, 23 N.C. (1 Ired.) 375 (1841).

C. "If it were not for your gray hairs, I would tear your heart out." Commonwealth v. Eyre, 1 Serg. & Rawle 347 (Pa.1815).

D. "I have a great mind to hit you." State v. Hampton, 63 N.C. 13 (1868).

E. "If you do not pay me my money, I will have your life"? Keefe v. State, 19 Ark. 190 (1857).

10. Can words make an assault out of conduct that would otherwise not be sufficient for the tort? Suppose that while defendant and plaintiff are engaged in a violent quarrel, defendant reaches for his hip pocket. Does it make any difference whether he says, "I'll blow your brains out," or "Pardon me, I need a handkerchief"?

11. What about words that threaten harm from an independent source? "Look out! There is a rattlesnake behind you!"

4. FALSE IMPRISONMENT

Big Town Nursing Home, Inc. v. Newman

Court of Civil Appeals of Texas, 1970.
461 S.W.2d 195.

McDONALD, CHIEF JUSTICE. This is an appeal by defendant Nursing Home from a judgment for plaintiff Newman for actual and exemplary damages in a false imprisonment case.

Plaintiff Newman sued defendant Nursing Home for actual and exemplary damages for falsely and wrongfully imprisoning him against his will from September 22, 1968 to November 11, 1968. * * *

Plaintiff is a retired printer 67 years of age, and lives on his social security and a retirement pension from his brother's printing company. He has not worked since 1959, is single, has Parkinson's disease, arthritis, heart trouble, a voice impediment, and a hiatal hernia. He has served in the army attaining the rank of Sergeant. He has never been in a mental hospital or treated by a psychiatrist. Plaintiff was taken to defendant nursing home on September 19, 1968, by his nephew who signed the admission papers and paid one month's care in advance. Plaintiff had been arrested for drunkenness and drunken driving in times past (the last time in 1966) and had been treated twice for alcoholism. Plaintiff testified he was not intoxicated and had nothing to drink during the week prior to admission to the nursing home. The admission papers provided that patient "will not be forced to remain in the nursing home against his will for any length of time." Plaintiff was not advised he would be kept at the nursing home against his will. On September 22, 1968, plaintiff decided he wanted to leave and tried to telephone for a taxi. Defendant's employees advised plaintiff he could not use the phone, or have any visitors unless the manager knew them, and locked plaintiff's grip and clothes up. Plaintiff walked out of the home, but was caught by employees of defendant and brought back forceably, and thereafter, placed in Wing 3 and locked up. Defendant's Administrator testified Wing 3 contained senile patients, drug addicts, alcoholics, mentally disturbed, incorrigibles and uncontrollables, and that "they were all in the same kettle of fish." Plaintiff tried to escape from the nursing home five or six times but was caught and brought back each time against his will. He was carried back to Wing 3 and locked and taped in a "restraint chair", for more than five hours. He was put back in the chair on subsequent occasions. He was not seen by the home doctor for some 10 days after he was admitted, and for 7 days after being placed in

Wing 3. The doctor wrote the social security office to change payment of plaintiff's social security checks without plaintiff's authorization. Plaintiff made every effort to leave and repeatedly asked the manager and assistant manager to be permitted to leave. The home doctor is actually a resident studying pathology and has no patients other than those in two nursing homes. Finally, on November 11, 1968, plaintiff escaped and caught a ride into Dallas, where he called a taxi and was taken to the home of a friend. During plaintiff's ordeal he lost 30 pounds. There was never any court proceeding to confine plaintiff. * * *

False imprisonment is the direct restraint of one person of the physical liberty of another without adequate legal justification. There is ample evidence to sustain [the jury's finding that plaintiff was falsely imprisoned]. * * *

Defendant placed plaintiff in Wing 3 with insane persons, alcoholics and drug addicts knowing he was not in such category; punished plaintiff by locking and taping him in the restraint chair; prevented him from using the telephone for 51 days; locked up his clothes; told him he could not be released from Wing 3 until he began to obey the rules of the home; and detained him for 51 days during which period he was demanding to be released and attempting to escape. * * *

Defendant may be compelled to respond in exemplary damages if the act causing actual damages is a wrongful act done intentionally in violation of the rights of plaintiff. [Cc]

Defendant acted in the utter disregard of plaintiff's legal rights, knowing there was no court order for commitment, and that the admission agreement provided he was not to be kept against his will. * * *

[The court of appeals found that the amount of damages was excessive and offered plaintiff a remittitur. Plaintiff subsequently agreed to the remittitur and the judgment below, so reformed, was affirmed.]

NOTES AND QUESTIONS

1. Plaintiff has a ticket to enter defendant's race track, but defendant refuses to admit him because the stewards have banned him from the track. False imprisonment? Marrone v. Washington Jockey Club, 35 App.D.C. 82 (1910) (mere refusal to admit not false imprisonment). Plaintiff attempts to enter a dance hall during a public dance, but is prevented by defendant who is under the mistaken belief that she is under eighteen. False imprisonment? Cullen v. Dickenson, 33 S.D. 27, 144 N.W. 656 (1913) (no). Suppose the exclusion is based on race or religion? There may be a civil rights action, but not false imprisonment. See 42 U.S.C. § 2000a, page 74, note 3.

2. Can there be false imprisonment in a moving automobile? Cieplinski v. Severn, 269 Mass. 261, 168 N.E. 722 (1929) (yes). In a city? Allen v. Fromme, 141 App.Div. 362, 126 N.Y.S. 520 (1910) (yes). In the state of Rhode Island? Texas? Cf. Albright v. Oliver, 975 F.2d 343 (7th Cir.1992) (in dicta, court notes that actionable confinement could be "as large as an entire state"). When plaintiff is not permitted to leave the country? Cf. Shen v. Leo A. Daly Co., 222 F.3d 472 (8th Cir. 2000) (applying Nebraska law) (although difficult to define exactly how close the restraint must be, the country of Taiwan is clearly too great an area within which to be falsely imprisoned).

3. If one exit of a room or a building is locked with plaintiff inside, but another reasonable means of exit is left open, there is no imprisonment. Davis & Allcott Co. v. Boozer, 215 Ala. 116, 110 So. 28 (1926) (door through which plaintiff had entered was locked but other door was not); Furlong v. German–American Press Ass'n, 189 S.W. 385, 389 (Mo.1916) ("If a way of escape is left open which is available without peril of life or limb, no imprisonment"). See also the classic case of Bird v. Jones, 7 A. & E., N.S., 742, 115 Eng.Rep. 668 (1845) (the portion of Hammersmith Bridge across the Thames River ordinarily used as a footpath was obstructed by seats that defendant had erected for viewing a regatta on the river and defendant's agents refused to let plaintiff pass along the footpath; no false imprisonment because plaintiff could have returned the way he had come or crossed the bridge in the carriage way).

4. What if it's just a joke? Employees of airline that prides itself on being a "fun-loving, spirited company" arranged for local police officers to perform a mock arrest of a new employee, complete with handcuffs and a suggestion that she find someone to post bail, as a prank to celebrate the end of her probation. Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197 (10th Cir. 2006) (applying New Mexico law) (neither brevity of seizure not its characterization as a prank enabled officers to avoid liability).

5. The Restatement (Second) of Torts § 36, comment *a*, treats the means of escape as unreasonable if it involves exposure of the person (plaintiff in the water and defendant steals his clothes), material harm to the clothing, or danger of substantial harm to another. Plaintiff would not be required to make his escape by crawling through a sewer.

6. A means of escape is not a reasonable one if the plaintiff does not know of its existence, and it is not apparent. Talcott v. National Exhibition Co., 144 App.Div. 337, 128 N.Y.S. 1059 (1911).

7. If the only means of escape could cause physical danger to plaintiff, and he could remain "imprisoned" without any risk of harm, he may not recover for injuries he suffers in making his escape. See Sindle v. New York City Transit Authority, 33 N.Y.2d 293, 307 N.E.2d 245, 352 N.Y.S.2d 183 (1973) (plaintiff jumped from window of moving bus on way to police station).

8. Along with battery and assault, false imprisonment has now become exclusively an intentional tort. The Restatement (Second) of Torts § 35, comment *h*, points out, however, that for negligence resulting in the confinement of another a negligence action will lie, but only if some actual damage results. Cf. Mouse v. Central Sav. & Trust Co., 120 Ohio St. 599, 7 Ohio L.Abs. 334, 167 N.E. 868 (1929). What would be the result if defendant double-parks his automobile and thus prevents plaintiff from driving to an important business meeting? False imprisonment is also like battery and assault in that no actual damages need be proved. Nominal damages may be awarded. Banks v. Fritsch, 39 S.W.3d 474 (Ky. App. 2001) (teacher who chained student to tree because of repeated absenteeism liable for nominal damages if student could not prove actual damages).

Parvi v. City of Kingston

Court of Appeals of New York, 1977.
41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161.

[Police, responding to a complaint, found two brothers engaged in a noisy quarrel in an alley behind a commercial building. Plaintiff was with

them, apparently trying to calm them. According to police testimony, all three were showing "the effects of alcohol." Plaintiff told the police he had no place to go, so rather than arrest him, they took him outside the city limits to an abandoned golf course to "dry out." There was conflicting testimony as to whether he went willingly. Within an hour, plaintiff had wandered 350 feet and onto the New York State Thruway, where he was struck by a car and severely injured. On cross-examination, he admitted he had no recollection of what happened that night.

Action for false imprisonment. The trial court dismissed the case and the Appellate Division affirmed.]

FUCHSBERG, JUSTICE. * * * [The element of] consciousness of confinement is a more subtle and more interesting subissue in this case. On that subject, we note that, while respected authorities have divided on whether awareness of confinement by one who has been falsely imprisoned should be a *sine qua non* for making out a case, [cc] *Broughton* [v. State of New York], 37 N.Y.2d p. 456, 373 N.Y.S.2d p. 92, 335 N.E.2d p. 313 has laid that question to rest in this State. Its holding gives recognition to the fact that false imprisonment, as a dignitary tort, is not suffered unless its victim knows of the dignitary invasion. Interestingly, the Restatement (Second) of Torts § 42 too has taken the position that there is no liability for intentionally confining another unless the person physically restrained knows of the confinement or is harmed by it.

However, though correctly proceeding on that premise, the Appellate Division, in affirming the dismissal of the cause of action for false imprisonment, erroneously relied on the fact that Parvi, after having provided additional testimony in his own behalf on direct examination, had agreed on cross that he no longer had any *recollection* of his confinement. In so doing, that court failed to distinguish between a later recollection of consciousness and the existence of that consciousness at the time when the imprisonment itself took place. The latter, of course, is capable of being proved though one who suffers the consciousness can no longer personally describe it, whether by reason of lapse of memory, incompetency, death or other cause. Specifically, in this case, while it may well be that the alcohol Parvi had imbibed or the injuries he sustained, or both, had had the effect of wiping out his recollection of being in the police car against his will, that is a far cry from saying that he was not conscious of his confinement at the time when it was actually taking place. And, even if plaintiff's sentient state at the time of his imprisonment was something less than total sobriety, that does not mean that he had no conscious sense of what was then happening to him. To the contrary, there is much in the record to support a finding that the plaintiff indeed was aware of his arrest at the time it took place. By way of illustration, the officers described Parvi's responsiveness to their command that he get into the car, his colloquy while being driven to Coleman Hill and his request to be let off elsewhere. At the very least, then, it was for the jury, in the first instance, to weigh credibility, evaluate inconsistencies and determine whether the burden of proof had been met. * * *

Reversed.

BREITEL, CHIEF JUDGE (dissenting). * * * [P]laintiff has failed even to make out a prima facie case that he was conscious of his purported confinement, and that he failed to consent to it. His memory of the entire incident had disappeared; at trial, Parvi admitted that he no longer had any independent recollection of what happened on the day of his accident, and that as to the circumstances surrounding his entrance into the police car, he only knew what had been suggested to him by subsequent conversations. In light of this testimony, Parvi's conclusory statement that he was ordered into the car against his will is insufficient, as a matter of law, to establish a prima facie case. * * *

NOTES AND QUESTIONS

1. In addition to the false imprisonment claim, could plaintiff have filed a negligence claim based on the police officers' conduct? For a more recent case with eerily similar facts, see Deuser v. Vecera, 139 F.3d 1190 (8th Cir.1998) (plaintiff's decedent who had been briefly detained by park rangers for public drunkenness, but not arrested, was released in a parking lot and wandered onto interstate where he was killed by motorist).

2. The mother of an ill and disoriented 16–year–old boy instructed a police officer to take her son to a particular hospital. Is there false imprisonment if the officer intentionally takes the boy to a different hospital? Cf. Haisenleder v. Reeder, 114 Mich.App. 258, 318 N.W.2d 634 (1982). Or what if the plaintiff, a sufferer from diabetes who is unconscious from insulin shock, is wrongfully arrested and confined in jail overnight in the belief that he is drunk, but is released before he regains consciousness. Is there a tort? See Prosser, False Imprisonment: Consciousness of Confinement, 55 Colum.L.Rev. 847 (1955); Restatement (Second) of Torts § 42.

3. Called upon to make an emergency evaluation, a doctor diagnoses a person as mentally ill and has her detained in a mental institution. Is this false imprisonment? See Williams v. Smith, 179 Ga.App. 712, 348 S.E.2d 50 (1986) (no false imprisonment if statutory commitment procedures were followed even if doctor was negligent in diagnosis); Foshee v. Health Mgt. Assocs., 675 So.2d 957 (Fla.App.1996) (false imprisonment if statutory commitment procedures were not followed by nurse who physically prevented patient from leaving a psychiatric facility and coerced her into signing voluntary admission papers). What if a hospital detains a woman for two hours while its staff initiates involuntary commitment proceedings because she is agitated and threatened suicide? Riffe v. Armstrong, 197 W.Va. 626, 477 S.E.2d 535 (1996) (hospital's action justified in light of plaintiff's condition upon arrival).

Hardy v. LaBelle's Distributing Co.

Supreme Court of Montana, 1983.
203 Mont. 263, 661 P.2d 35.

GULBRANDSON, JUSTICE. * * * Defendant, LaBelle's Distributing Company (LaBelle's) hired Hardy as a temporary employee on December 1, 1978. She was assigned duty as a sales clerk in the jewelry department.

On December 9, 1978, another employee for LaBelle's, Jackie Renner, thought she saw Hardy steal one of the watches that LaBelle's had in stock.

Jackie Renner reported her belief to LaBelle's showroom manager that evening.

On the morning of December 10, Hardy was approached by the assistant manager of LaBelle's jewelry department and told that all new employees were given a tour of the store. He showed her into the showroom manager's office and then left, closing the door behind him.

There is conflicting testimony concerning who was present in the showroom manager's office when Hardy arrived. Hardy testified that David Kotke, the showroom manager, Steve Newsom, the store's loss prevention manager, and a uniformed policeman were present. Newsom and one of the policemen in the room testified that another policeman, instead of Kotke, was present.

Hardy was told that she had been accused of stealing a watch. Hardy denied taking the watch and agreed to take a lie detector test. According to conflicting testimony, the meeting lasted approximately from twenty to forty-five minutes.

Hardy took the lie detector test, which supported her statement that she had not taken the watch. The showroom manager apologized to Hardy the next morning and told her that she was still welcome to work at LaBelle's. The employee who reported seeing Hardy take the watch also apologized. The two employees then argued briefly, and Hardy left the store.

Hardy brought this action claiming that defendants had wrongfully detained her against her will when she was questioned about the watch.

On appeal Hardy raises basically two issues: (1) Whether the evidence is sufficient to support the verdict and judgment and (2) Whether the District Court erred in the issuance of its instructions.

The two key elements of false imprisonment are the restraint of an individual against his will and the unlawfulness of such restraint. [Cc] The individual may be restrained by acts or merely by words which he fears to disregard. [Cc]

Here, there is ample evidence to support the jury's finding that Hardy was not unlawfully restrained against her will. While Hardy stated that she felt compelled to remain in the showroom manager's office, she also admitted that she wanted to stay and clarify the situation. She did not ask to leave. She was not told she could not leave. No threat of force or otherwise was made to compel her to stay. Although she followed the assistant manager into the office under pretense of a tour, she testified at trial that she would have followed him voluntarily if she had known the true purpose of the meeting and that two policemen were in the room. Under these circumstances, the jury could easily find that Hardy was not detained against her will. [Cc] See also, Meinecke v. Skaggs (1949), 123 Mont. 308, 213 P.2d 237, and Roberts v. Coleman (1961), 228 Or. 286, 365 P.2d 79. * * *

[The court also found that the District Court did not err in issuance of jury instructions on the law of false imprisonment, and affirmed the District Court's judgment in favor of defendants.]

NOTES AND QUESTIONS

1. An employee is suspected of stealing property from her employer and is told a trip to her home is necessary to recover the property. If the employee feels mentally compelled for fear of losing her job to go in an automobile with her supervisor to her home, has she been confined involuntarily? See Faniel v. Chesapeake & Potomac Tel. Co., 404 A.2d 147 (D.C.App.1979) (fear of losing one's job is a powerful incentive, but it does not render behavior involuntary).

2. Retention of plaintiff's property sometimes may provide the "restraint" necessary to constitute false imprisonment. See Fischer v. Famous–Barr Co., 646 S.W.2d 819 (Mo.App.1982), where plaintiff set off the security alarm when exiting a store because the salesperson forgot to remove the sensor tag from an article of clothing she had purchased. Because an employee of the store took possession of the bag containing her purchases, plaintiff felt she had to follow the employee back to the fourth floor where she had made her purchase. Compare Marcano v. Northwestern Chrysler–Plymouth Sales, Inc., 550 F.Supp. 595 (N.D.Ill.1982), where plaintiff went to a car dealership to discuss a dispute over payments on her loan and voluntarily gave her keys to the dealer so he could inspect the car. The dealer locked the car and kept the keys. Plaintiff stayed at the dealership for five hours. The court held that there was no false imprisonment because she could have left and because the intention of defendant was not to confine her personally, but only to keep the car.

3. False imprisonment has not been extended beyond such direct duress to person or to property. If the plaintiff submits merely to persuasion, and accompanies the defendant to clear himself of suspicion, without any implied threat of force, the action does not lie. Hunter v. Laurent, 158 La. 874, 104 So. 747 (1925); James v. MacDougall & Southwick Co., 134 Wash. 314, 235 P. 812 (1925). Suppose the defendant says to the plaintiff, "You must remain in this room, or I will never speak to you again"? Compare Fitscher v. Rollman & Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929), where defendant threatened to make a scene on the street unless plaintiff remained.

4. It is generally agreed that false imprisonment resembles assault, in that threats of future action are not enough. Thus the action does not lie where the defendant merely threatens to call the police and have the plaintiff arrested unless he remains. Sweeney v. F.W. Woolworth Co., 247 Mass. 277, 142 N.E. 50 (1924); Priddy v. Bunton, 177 S.W.2d 805 (Tex.Civ.App.1943).

5. On the shopkeeper's privilege to detain a suspected thief, see Bonkowski v. Arlan's Department Store, page 116.

Enright v. Groves

Colorado Court of Appeals, 1977.
39 Colo.App. 39, 560 P.2d 851.

SMITH, JUDGE. Defendants Groves and City of Ft. Collins appeal from judgments entered against them upon jury verdicts awarding plaintiff $500

actual damages and $1,000 exemplary damages on her claim of false imprisonment * * *.

The evidence at trial disclosed that on August 25, 1974, Officer Groves, while on duty as a uniformed police officer of the City of Fort Collins, observed a dog running loose in violation of the city's "dog leash" ordinance. He observed the animal approaching what was later identified as the residence of Mrs. Enright, the plaintiff. As Groves approached the house, he encountered Mrs. Enright's eleven-year-old son, and asked him if the dog belonged to him. The boy replied that it was his dog, and told Groves that his mother was sitting in the car parked at the curb by the house. Groves then ordered the boy to put the dog inside the house, and turned and started walking toward the Enright vehicle.

Groves testified that he was met by Mrs. Enright with whom he was not acquainted. She asked if she could help him. Groves responded by demanding her driver's license. She replied by giving him her name and address. He again demanded her driver's license, which she declined to produce. Groves thereupon advised her that she could either produce her driver's license or go to jail. Mrs. Enright responded by asking, "Isn't this ridiculous?" Groves thereupon grabbed one of her arms, stating, "Let's go!" * * *

She was taken to the police station where a complaint was signed charging her with violation of the "dog leash" ordinance and bail was set. Mrs. Enright was released only after a friend posted bail. She was later convicted of the ordinance violation. * * *

Appellants contend that Groves had probable cause to arrest Mrs. Enright, and that she was in fact arrested for and convicted of violation of the dog-at-large ordinance. They assert, therefore, that her claim for false imprisonment or false arrest cannot lie, and that Groves' use of force in arresting Mrs. Enright was permissible. We disagree.

False arrest arises when one is taken into custody by a person who claims but does not have proper legal authority. W. Prosser, Torts § 11 (4th ed.). Accordingly, a claim for false arrest will not lie if an officer has a valid warrant or probable cause to believe that an offense has been committed and that the person who was arrested committed it. Conviction of the crime for which one is specifically arrested is a complete defense to a subsequent claim of false arrest. [Cc]

Here, however, the evidence is clear that Groves arrested Mrs. Enright, not for violation of the dog leash ordinance, but rather for refusing to produce her driver's license. This basis for the arrest is exemplified by the fact that he specifically advised her that she would either produce the license or go to jail. We find no statute or case law in this jurisdiction which requires a citizen to show her driver's license upon demand, unless, for example, she is a driver of an automobile and such demand is made in that connection. * * *

Here, there was no testimony that Groves ever even attempted to explain why he was demanding plaintiff's driver's license, and it is clear

that she had already volunteered her name and address. Groves admitted that he did not ask Mrs. Enright if she had any means of identification on her person, instead he simply demanded that she give him her driver's license.

We conclude that Groves' demand for Mrs. Enright's driver's license was not a lawful order and that refusal to comply therewith was not therefore an offense in and of itself. Groves was not therefore entitled to use force in arresting Mrs. Enright. Thus Groves' defense based upon an arrest for and conviction of a specific offense must, as a matter of law, fail.
* * *

Judgment affirmed.

NOTES AND QUESTIONS

1. Is it necessary that the defendant be an officer? Suppose a filling station attendant asserts legal authority to detain the plaintiff, believing he had stolen cash from the station? Daniel v. Phillips Petroleum Co., 229 Mo.App. 150, 73 S.W.2d 355 (1934). (upholding jury verdict for plaintiff). Plaintiff, alighting from defendant's train, fell and broke his leg. Defendant's conductor told plaintiff that the law required him to remain and fill out a statement about the accident. Plaintiff did so, and his cab was held for fifteen or twenty minutes, during which plaintiff was in considerable pain, while the statement was filled out and signed. This was held to be false imprisonment. Whitman v. Atchison, T. & S.F.R. Co., 85 Kan. 150, 116 P. 234 (1911).

2. A private citizen who aids a police officer in making a false arrest can be held liable to plaintiff for false imprisonment. If, however, the police officer requests assistance, the private citizen will not be liable unless he knows the arrest is an unlawful one. See Restatement (Second) of Torts §§ 45A and 139.

3. Merely providing information to the police, even if it turns out to be incorrect information, is not enough to support a claim of false imprisonment. Holcomb v. Walter's Dimmick Petroleum, Inc., 858 N.E.2d 103, 107 (Ind. 2006) ("Liability will not be imposed when the defendant does nothing more than detail his version of the facts to a policeman and ask for his assistance, leaving it to the officer to determine what is the appropriate response, at least where his representation of the facts does not prevent the intelligent exercise of the officer's discretion.") See also Highfill v. Hale, 186 S.W.3d 277 (Mo. 2006) (because deputy's decision to arrest neighbors for stalking was based at least partly on deputy's own investigation, complainant was not liable).

Whittaker v. Sandford

Supreme Judicial Court of Maine, 1912.
110 Me. 77, 85 A. 399.

[Plaintiff was a member and her husband was a minister of a religious sect, of which defendant was the leader. The sect had a colony in Maine and at Jaffa (now Tel Aviv), the latter of which plaintiff had joined. Plaintiff decided to abandon the sect and to return to America. While she and her four children were in Jaffa awaiting passage on a steamer, defendant offered her passage back to America on his yacht. When plaintiff

told defendant that she was afraid that he would not let her off the yacht until she was "won to the movement again," defendant assured her repeatedly that under no circumstances would she be detained on board. Plaintiff accepted this assurance and sailed for America on the yacht. On arrival in port, defendant refused to furnish her with a boat so that she could leave the yacht, saying it was up to her husband whether she could leave. When plaintiff raised the issue with her husband, he said it was up to defendant, the leader of the sect and the owner of the yacht. She remained on board for nearly a month, during which time defendant and plaintiff's husband attempted to persuade her to rejoin the sect. On several occasions, plaintiff, always in the company of her husband, was allowed to go ashore to the mainland and to various islands. She was not allowed to leave the yacht unaccompanied. She finally obtained her release and that of her four children with the assistance of the sheriff and a writ of habeas corpus. She then brought this action for false imprisonment. The jury returned a verdict in her favor for $1100. Defendant excepted to the court's instructions, and appealed from an order denying his motion for a new trial.]

SAVAGE, J. * * * The court instructed the jury that the plaintiff to recover must show that the restraint was physical, and not merely a moral influence; that it must have been actual physical restraint, in the sense that one intentionally locked into a room would be physically restrained but not necessarily involving physical force upon the person; that it was not necessary that the defendant, or any person by his direction, should lay his hand upon the plaintiff; that if the plaintiff was restrained so that she could not leave the yacht Kingdom by the intentional refusal to furnish transportation as agreed, she not having it in her power to escape otherwise, it would be a physical restraint and unlawful imprisonment. We think the instructions were apt and sufficient. If one should, without right, turn the key in a door, and thereby prevent a person in the room from leaving, it would be the simplest form of unlawful imprisonment. The restraint is physical. The four walls and the locked door are physical impediments to escape. Now is it different when one who is in control of a vessel at anchor, within practical rowing distance from the shore, who has agreed that a guest on board shall be free to leave, there being no means to leave except by rowboats, wrongfully refuses the guest the use of a boat? The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel. The restraint is physical. The impassable sea is the physical barrier. * * *

A careful study of the evidence leads us to conclude that the jury were warranted in finding that the defendant was guilty of unlawful imprisonment. This, to be sure, is not an action based upon the defendant's failure to keep his agreement to permit the plaintiff to leave the yacht as soon as it should reach shore. But his duty under the circumstances is an important consideration. It cannot be believed that either party to the agreement understood that it was his duty merely to bring her to an American harbor. The agreement implied that she was to go ashore. There was no practical way for her to go ashore except in the yacht's boats. The agreement must be understood to mean that he would bring her to land, or to allow her to

get to land, by the only available means. The evidence is that he refused her a boat. His refusal was wrongful. The case leaves not the slightest doubt that he had the power to control the boats, if he chose to exercise it. It was not enough for him to leave it to the husband to say whether she might go ashore or not. She had a personal right to go on shore. If the defendant personally denied her the privilege, as the jury might find he did, it was a wrongful denial.

NOTES AND QUESTIONS

1. A woman tells her boyfriend she does not want to see him anymore, but agrees to ride with him just to the store and back. When they return to her parents' house and she opens the car door, the boyfriend suddenly starts the car off, making it dangerous for her to exit the moving vehicle. False imprisonment? See Noguchi v. Nakamura, 2 Haw.App. 655, 638 P.2d 1383 (1982).

2. In Talcott v. National Exhibition Co., 144 App.Div. 337, 128 N.Y.S. 1059 (1911), plaintiff was one of a crowd seeking admission to the baseball game between the Chicago Cubs and the New York Giants that played off the tie for the 1908 National League pennant. This was necessary because of a one-to-one tie in an earlier game between the same teams, produced when Fred Merkle of the Giants pulled his famous "bonehead play" in failing to touch second base. For two fascinating accounts of that game told by other players in it, see L. Ritter, The Glory of Their Times 98–100 and 124–218 (1966); the book has a picture of the after-game crowd in the Polo Grounds at page 126. The Giants, who would have won the pennant except for the Merkle error, lost the playoff game. Plaintiff succeeded in entering an enclosure where tickets were sold, but found that he could not get in to the stands. Defendant closed the entrance gates behind him to prevent injuries from the crush. There was another exit, but because defendant failed to inform plaintiff of its existence, he remained within the enclosure for more than an hour. In his action for false imprisonment, a verdict and judgment in his favor were affirmed. It was held that while the defendant might have been justified in closing the gates, it was then under a duty to inform plaintiff of the other exit.

3. Members of a religious cult are abducted by their relatives and subjected to deprogramming. Is this false imprisonment? Eilers v. Coy, 582 F.Supp. 1093 (D.Minn.1984).

4. Plaintiff boarded a plane in Washington, D.C., for a flight to New York where he was to attend a reception at the United Nations. After sitting on the tarmac for over an hour waiting for his flight to take off, plaintiff realized he would miss the reception and demanded to be returned to the terminal. Is the airline liable for failing to allow him to leave the airplane after it had pulled away from the gate? After it had sat on the tarmac for an hour? Somewhere above New Jersey? See Abourezk v. New York Airlines, 895 F.2d 1456 (D.C.Cir.1990) (no duty to release passenger until plane reached New York absent exigent circumstances not present in the case).

5. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

State Rubbish Collectors Ass'n v. Siliznoff

Supreme Court of California, 1952.
38 Cal.2d 330, 240 P.2d 282.

[The State Rubbish Collectors Association sued Siliznoff to collect on certain notes. Siliznoff sought cancellation of the notes because of duress

and want of consideration. In addition, he sought general and punitive damages because of alleged "assaults" made on him. The evidence was that Siliznoff had collected the trash from the Acme Brewing Company, which the Association regarded as within the territory of another member of the Association named Abramoff. The defendant was called before the Association and ordered to pay over the collected money to Abramoff, as a result of which he signed the notes in question. Further facts appear in the opinion.

The jury returned a verdict for Siliznoff on the original complaint and on the counterclaim. Siliznoff obtained a judgment against the Association for $1,250 general and special damages and $4,000 punitive damages. The Association appealed the judgment.]

TRAYNOR, J. * * * Plaintiff's primary contention is that the evidence is insufficient to support the judgment. Defendant testified that: * * *

Andikian [an inspector of the Association] told defendant that " 'We will give you up till tonight to get down to the board meeting and make some kind of arrangements or agreements about the Acme Brewery, or otherwise we are going to beat you up.' * * * He says he either would hire somebody or do it himself. And I says, 'Well, what would they do to me?' He says, well, they would physically beat me up first, cut up the truck tires or burn the truck, or otherwise put me out of business completely. He said if I didn't appear at that meeting and make some kind of an agreement that they would do that, but he says up to then they would let me alone, but if I walked out of that meeting that night they would beat me up for sure." Defendant attended the meeting and protested that he owed nothing for the Acme account and in any event could not pay the amount demanded. He was again told by the president of the association that "that table right there [the board of directors] ran all the rubbish collecting in Los Angeles and if there was any routes to be gotten that they would get them and distribute them among their members * * *." After two hours of further discussion defendant agreed to join the association and pay for the Acme account. He promised to return the next day and sign the necessary papers. He testified that the only reason "they let me go home, is that I promised that I would sign the notes the very next morning." The president "made me promise on my honor and everything else, and I was scared, and I knew I had to come back, so I believe he knew I was scared and that I would come back. That's the only reason they let me go home." Defendant also testified that because of the fright he suffered during his dispute with the association he became ill and vomited several times and had to remain away from work for a period of several days.

Plaintiff contends that the evidence does not establish an assault against defendant because the threats made all related to action that might take place in the future; that neither Andikian nor members of the board of directors threatened immediate physical harm to defendant. [C] We have concluded, however, that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being,

whether or not the threats are made under such circumstances as to constitute a technical assault.

In the past it has been frequently stated that the interest in emotional and mental tranquillity is not one that the law will protect from invasion in its own right. [Cc] As late as 1934 the Restatement of Torts took the position that "The interest in mental and emotional tranquillity and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance." Restatement, Torts, § 46, comment *c*. The Restatement explained the rule allowing recovery for the mere apprehension of bodily harm in traditional assault cases as an historical anomaly (§ 24, comment *c*), and the rule allowing recovery for insulting conduct by an employee of a common carrier as justified by the necessity of securing for the public comfortable as well as safe service (§ 48, comment *c*).

The Restatement recognized, however, that in many cases mental distress could be so intense that it could reasonably be foreseen that illness or other bodily harm might result. If the defendant intentionally subjected the plaintiff to such distress and bodily harm resulted, the defendant would be liable for negligently causing the plaintiff bodily harm. Restatement, Torts, §§ 306, 312. Under this theory the cause of action was not founded on a right to be free from intentional interference with mental tranquillity, but on the right to be free from negligent interference with physical well-being. A defendant who intentionally subjected another to mental distress without intending to cause bodily harm would nevertheless be liable for resulting bodily harm if he should have foreseen that the mental distress might cause such harm.

The California cases have been in accord with the Restatement in allowing recovery where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. [Cc]

The view has been forcefully advocated that the law should protect emotional and mental tranquillity as such against serious and intentional invasions, [cc] and there is a growing body of case law supporting this position. [Cc] In recognition of this development the American Law Institute amended section 46 of the Restatement of Torts in 1947 to provide:

"One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

In explanation it is stated that "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious. The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests. In the absence of a privilege, the actor's conduct has no social utility; indeed it is anti-social. No reason or policy requires such an actor to be protected from the liability which

usually attaches to the wilful wrongdoer whose efforts are successful." (Restatement of the Law, 1948 Supplement, Torts, § 46, comment *d.*)

There are persuasive arguments and analogies that support the recognition of a right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquillity. If a cause of action is otherwise established, it is settled that damages may be given for mental suffering naturally ensuing from the acts complained of [cc], and in the case of many torts, such as assault, battery, false imprisonment and defamation, mental suffering will frequently constitute the principal element of damages. [C] In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury.

It may be contended that to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary to insure that serious mental suffering actually occurred. The jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury. [C] Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom. * * *

In the present case plaintiff caused defendant to suffer extreme fright. By intentionally producing such fright it endeavored to compel him either to give up the Acme account or pay for it, and it had no right or privilege to adopt such coercive methods in competing for business. In these circumstances liability is clear. * * *

The judgment is affirmed.

NOTES AND QUESTIONS

1. Why not assault? Why not false imprisonment? Assuming neither tort occurred, how many attorneys in 1952 would have thought of bringing a cross-complaint in this case for "intentional infliction of emotional harm"? How many judges would have adopted it?

2. But what form of tort has been unleashed? Is it as definite in character as those that arose out of the writ of trespass? What would the result have been in the main case if the Association had only threatened to close down Siliznoff's business, but had not made threats to his physical well-being? Do you agree that the jury can more easily determine whether conduct is outrageous than whether physical injury resulted from emotional harm? If so, does this fact suggest that a claim should be allowed?

3. The seminal case to allow recovery for the intentional infliction of mental distress as a distinct tort was Wilkinson v. Downton, [1897] 2 Q.B. 57, in which a practical joker amused himself by telling the plaintiff that her husband had been

smashed up in an accident, was lying at The Elms in Leytonstone with both legs broken, and that she was to go to him at once in a cab with two pillows to fetch him home. The shock to her nervous system caused serious physical illness with permanent consequences, and at one time threatened her reason. The cause of action through which defendant was held liable is unclear to the reader of the opinion and apparently to the court as well.

4. *Interference with Human Bodies.* Before the recognition of a separate tort for intentional infliction of emotional distress, a number of courts had allowed recovery for mental distress at the intentional mutilation or disinterment of a dead body or for interference with proper burial. See, for example, Alderman v. Ford, 146 Kan. 698, 72 P.2d 981 (1937); Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970). In these and later cases, the courts have talked of a property right in the body, said to be in the next of kin or a group of close relatives, which serves as a foundation for the action for mental disturbance. See, for example, Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir.1995) (discussing Ohio and Michigan law) (unauthorized removal of corneas and eyeballs by coroner). In Gadbury v. Bleitz, 133 Wash. 134, 233 P. 299 (1925), where the body was held without burial with demand for payment of another debt, the court avoided difficulties surrounding right of ownership by recognizing that the tort was in reality the intentional infliction of mental distress upon the survivors by extreme outrage. In accord, Gray Brown–Service Mortuary, Inc. v. Lloyd, 729 So.2d 280, 285 (Ala. 1999) ("It has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering.")

5. *Common Carriers and Innkeepers* have been held to a higher standard of conduct and sometimes held liable for using insulting language to their passengers and patrons. See, e.g., Lipman v. Atlantic Coast Line R.R. Co., 108 S.C. 151, 93 S.E. 714 (1917) (carrier); Emmke v. De Silva, 293 F. 17 (8th Cir. 1923) (hotel). But cf. Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (D.C. Mun. App. 1946) (restaurant patron did not state cause of action based on waiter's insult) and Bethel v. N.Y.C. Transit Authority, 92 N.Y.2d 348, 681 N.Y.S.2d 201, 703 N.E.2d 1214 (1998) (abolishing higher standard of care for common carriers).

6. As the principal case indicates, § 46 of the Restatement of Torts was changed in the 1948 Supplement to recognize the cause of action for the intentional infliction of severe emotional distress, called "outrage" in some jurisdictions. As with any newly recognized cause of action, the courts in each jurisdiction must struggle with what its contours will be. What sorts of conduct constitutes "extreme and outrageous" conduct? Are words alone enough? Should the plaintiff's individual vulnerabilities be taken into account? How does the jury determine whether the emotional distress is "severe"? Is it necessary that the defendant intended to cause the mental disturbance, or that it be substantially certain to follow, within the rule stated in Garratt v. Dailey, page 17?

Slocum v. Food Fair Stores of Florida

Supreme Court of Florida, 1958.
100 So.2d 396.

DREW, JUSTICE. This appeal is from an order dismissing a complaint for failure to state a cause of action. Simply stated, the plaintiff sought money damages for mental suffering or emotional distress, and an ensuing heart

attack and aggravation of pre-existing heart disease, allegedly caused by insulting language of the defendant's employee directed toward her while she was a customer in its store. Specifically, in reply to her inquiry as to the price of an item he was marking, he replied: "If you want to know the price, you'll have to find out the best way you can * * * you stink to me." She asserts, in the alternative, that the language was used in a malicious or grossly reckless manner, "or with intent to inflict great mental and emotional disturbance to said plaintiff."

No great difficulty is involved in the preliminary point raised as to the sufficiency of damages alleged, the only direct injury being mental or emotional with physical symptoms merely derivative therefrom. [C] While that decision would apparently allow recovery for mental suffering, even absent physical consequences, inflicted in the course of other intentional or malicious torts, it does not resolve the central problem in this case, i.e. whether the conduct here claimed to have caused the injury, the use of insulting language under the circumstances described, constituted an actionable invasion of a legally protected right. Query: does such an assertion of a deliberate disturbance of emotional equanimity state an independent cause of action in tort?

Appellant's fundamental argument is addressed to that proposition. The case is one of first impression in this jurisdiction, and she contends that this Court should recognize the existence of a new tort, an independent cause of action for intentional infliction of emotional distress.

A study of the numerous references on the subject indicates a strong current of opinion in support of such recognition, in lieu of the strained reasoning so often apparent when liability for such injury is predicated upon one or another of several traditional tort theories. * * *

A most cogent statement of the doctrine covering tort liability for insult has been incorporated in the Restatement of the Law of Torts, 1948 supplement, sec. 46, entitled "Conduct intended to cause emotional distress only." It makes a blanket provision for liability on the part of "one, who, without a privilege to do so, intentionally causes severe emotional distress to another," indicating that the requisite intention exists "when the act is done for the purpose of causing the distress or with knowledge * * * that severe emotional distress is substantially certain to be produced by [such] conduct." Comment (a), Sec. 46, supra. Abusive language is, of course, only one of the many means by which the tort could be committed.

However, even if we assume, without deciding, the legal propriety of that doctrine, a study of its factual applications shows that a line of demarcation should be drawn between conduct likely to cause mere "emotional distress" and that causing "severe emotional distress," so as to exclude the situation at bar. [C] "So far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability only for conduct exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause mental damage of a very serious kind." [C] And the most practicable view is that the functions of court and jury are no different than in other tort actions where there is at the outset

a question as to whether the conduct alleged is so legally innocuous as to present no issue for a jury. [C]

This tendency to hinge the cause of action upon the degree of the insult has led some courts to reject the doctrine in toto. [C] Whether or not this is desirable, it is uniformly agreed that the determination of whether words or conduct are actionable in character is to be made on an objective rather than subjective standard, from common acceptation. The unwarranted intrusion must be calculated to cause "severe emotional distress" to a person of ordinary sensibilities, in the absence of special knowledge or notice. There is no inclination to include all instances of mere vulgarities, obviously intended as meaningless abusive expressions. While the manner in which language is used may no doubt determine its actionable character, appellant's assertion that the statement involved in this case was made to her with gross recklessness, etc., cannot take the place of allegations showing that the words were intended to have real meaning or serious effect.

A broader rule has been developed in a particular class of cases, usually treated as a distinct and separate area of liability originally applied to common carriers. Rest.Torts, per. ed., sec. 48. The courts have from an early date granted relief for offense reasonably suffered by a patron from insult by a servant or employee of a carrier, hotel, theater, and most recently, a telegraph office. The existence of a special relationship, arising either from contract or from the inherent nature of a non-competitive public utility, supports a right and correlative duty of courtesy beyond that legally required in general mercantile or personal relationships. [Cc]

In view of the concurrent development of the cause of action first above described, there is no impelling reason to extend the rule of the latter cases. Their rationale does not of necessity cover the area of business invitees generally, where the theory of respondeat superior underlying most liabilities of the employer would dictate some degree of conformity to standards of individual liability. This factor, together with the stringent standards of care imposed in a number of the carrier cases [c], may have influenced the treatment of the subject by editors of the Restatement, where the statement of the carrier doctrine is quite limited in scope and classified separately from the section covering the more general area of liability under consideration. But whether or not these rules are ultimately adopted in this jurisdiction, the facts of the present case cannot be brought within their reasonable intendment.

Affirmed.

NOTES AND QUESTIONS

1. Why is the intentional infliction of mental disturbance by the insult not a tort in itself?

2. "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be. * * * Of course there is danger of getting into the realm of the trivial in this matter of insulting

language. No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam." Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033, 1035, 1053 (1936).

3. A South Carolina gentleman, incensed at his inability to get a telephone number, so far forgets his chivalry as to call the operator a God damned woman, and to say that if he were there he would break her God damned neck. The unprecedented experience, according to her allegations, causes her extreme mental disturbance and leaves her a nervous wreck. Does this state a cause of action? Brooker v. Silverthorne, 111 S.C. 553, 99 S.E. 350, 352 (1919) (language attributed to defendant "merits severest condemnation and subjects user to the scorn and contempt of his fellow men. But it is not civilly actionable.")

4. None of these was found actionable: Halliday v. Cienkowski, 333 Pa. 123, 3 A.2d 372 (1939) ("Scotch bitch," "bastard," and "bum"); Atkinson v. Bibb Mfg. Co., 50 Ga.App. 434, 178 S.E. 537 (1935) (foreman cursing discharged woman, with open knife in his hand); Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913) (profanity and abuse over the telephone, with threats of future violence); Barry v. Baugh, 111 Ga.App. 813, 143 S.E.2d 489 (1965) ("crazy").

5. What if the slurs or insults focus on racial, ethnic, or sexual characteristics? Most courts have found them not so outrageous as to be intolerable in a civilized society. See, for example, Harville v. Lowville Central School Dist., 245 A.D.2d 1106, 667 N.Y.S.2d 175 (App. Div. 1997) (student called "Polish Nazi" by teacher); Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239 (5th Cir. 1993) (applying Texas law) (worker called "wetback" by supervisor); Taggart v. Drake Univ., 549 N.W.2d 796 (Iowa 1996) (in fit of temper, dean addresses faculty member as "young woman" and refers to her in a "sexist and condescending manner"). Such words may be considered along with other conduct, however, in making a claim. Contreras v. Crown Zellerbach Corp., 88 Wash.2d 735, 736, 565 P.2d 1173, 1174 (1977) ("continuous humiliation and embarrassment by reason of racial jokes, slurs and comments made in his presence" by coworkers and supervisors held to state a claim).

6. Note the last sentence of the opinion in the principal case. The Supreme Court of Florida did not adopt intentional infliction of emotional distress until almost thirty years later. Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985).

Harris v. Jones

Court of Appeals of Maryland, 1977.
281 Md. 560, 380 A.2d 611.

MURPHY, CHIEF JUDGE. * * * The plaintiff, William R. Harris, a 26–year–old, 8–year employee of General Motors Corporation (GM), sued GM and one of its supervisory employees, H. Robert Jones, in the Superior Court of Baltimore City. The declaration alleged that Jones, aware that Harris suffered from a speech impediment which caused him to stutter, and also aware of Harris' sensitivity to his disability, and his insecurity because of it, nevertheless "maliciously and cruelly ridiculed * * * [him] thus causing tremendous nervousness, increasing the physical defect itself and further injuring the mental attitude fostered by the Plaintiff toward his problem

and otherwise intentionally inflicting emotional distress." It was also alleged in the declaration that Jones' actions occurred within the course of his employment with GM and that GM ratified Jones' conduct.

The evidence at trial showed that Harris stuttered throughout his entire life. While he had little trouble with one syllable words, he had great difficulty with longer words or sentences, causing him at times to shake his head up and down when attempting to speak.

During part of 1975, Harris worked under Jones' supervision at a GM automobile assembly plant. Over a five-month period, between March and August of 1975, Jones approached Harris over 30 times at work and verbally and physically mimicked his stuttering disability. In addition, two or three times a week during this period, Jones approached Harris and told him, in a "smart manner," not to get nervous. As a result of Jones' conduct, Harris was "shaken up" and felt "like going into a hole and hide."

On June 2, 1975, Harris asked Jones for a transfer to another department; Jones refused, called Harris a "troublemaker" and chastised him for repeatedly seeking the assistance of his committeeman, a representative who handles employee grievances. On this occasion, Jones, "shaking his head up and down" to imitate Harris, mimicked his pronunciation of the word "committeeman," which Harris pronounced "mmitteeman." * * *

Harris had been under the care of a physician for a nervous condition for six years prior to the commencement of Jones' harassment. He admitted that many things made him nervous, including "bosses." Harris testified that Jones' conduct heightened his nervousness and his speech impediment worsened. He saw his physician on one occasion during the five-month period that Jones was mistreating him; the physician prescribed pills for his nerves.

Harris admitted that other employees at work mimicked his stuttering. Approximately 3,000 persons were employed on each of two shifts, and Harris acknowledged the presence at the plant of a lot of "tough guys," as well as profanity, name-calling and roughhousing among the employees. He said that a bad day at work caused him to become more nervous than usual. He admitted that he had problems with supervisors other than Jones, that he had been suspended or relieved from work 10 or 12 times, and that after one such dispute, he followed a supervisor home on his motorcycle, for which he was later disciplined.

On this evidence, * * * the jury awarded Harris $3,500 compensatory damages and $15,000 punitive damages against both Jones and GM. [This was reversed by the Court of Special Appeals.]

In concluding that the intentional infliction of emotional distress, standing alone, may constitute a valid tort action, the Court of Special Appeals relied upon Restatement (Second) of Torts, ch. 2, *Emotional Distress*, § 46 (1965), which provides, in pertinent part:

"§ 46. Outrageous Conduct Causing Severe Emotional Distress

"(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability

for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

The court noted that the tort was recognized, and its boundaries defined, in W. Prosser, Law of Torts § 12, at 56 (4th ed. 1971), as follows:

"So far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind."

The trend in other jurisdictions toward recognition of a right to recover for severe emotional distress brought on by the intentional act of another is manifest. Indeed, 37 jurisdictions appear now to recognize the tort as a valid cause of action. * * *

[F]our elements * * * must coalesce to impose liability for intentional infliction of emotional distress:

(1) The conduct must be intentional or reckless;

(2) The conduct must be extreme and outrageous;

(3) There must be a causal connection between the wrongful conduct and the emotional distress;

(4) The emotional distress must be severe. * * *

[The intermediate Court of Special Appeals had found that the first two elements were established but reversed on the ground that the last two elements were not.]

Whether the conduct of a defendant has been "extreme and outrageous," so as to satisfy that element of the tort, has been a particularly troublesome question. Section 46 of the Restatement, comment *d*, states that "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." The comment goes on to state that liability does not extend, however: "to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. * * * "

In determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred. [C] The personality of the individual to whom the misconduct is directed is also a factor. "There is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine." Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich.L.Rev. 874, 887 (1939). * * *

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as extreme and outra-

geous; where reasonable men may differ, it is for the jury to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. * * *

While it is crystal clear that Jones' conduct was intentional, we need not decide whether it was extreme or outrageous, or causally related to the emotional distress which Harris allegedly suffered.[2] The fourth element of the tort—that the emotional distress must be severe—was not established by legally sufficient evidence justifying submission of the case to the jury. That element of the tort requires the plaintiff to show that he suffered a *severely* disabling emotional response to the defendant's conduct. The severity of the emotional distress is not only relevant to the amount of recovery, but is a necessary element to any recovery. * * *

Assuming that a causal relationship was shown between Jones' wrongful conduct and Harris' emotional distress, we find no evidence, legally sufficient for submission to the jury, that the distress was "severe" within the contemplation of the rule requiring establishment of that element of the tort. The evidence that Jones' reprehensible conduct humiliated Harris and caused him emotional distress, which was manifested by an aggravation of Harris' pre-existing nervous condition and a worsening of his speech impediment, was vague and weak at best. * * * While Harris' nervous condition may have been exacerbated somewhat by Jones' conduct, his family problems antedated his encounter with Jones and were not shown to be attributable to Jones' actions. Just how, or to what degree, Harris' speech impediment worsened is not revealed by the evidence. Granting the cruel and insensitive nature of Jones' conduct toward Harris, and considering the position of authority which Jones held over Harris, we conclude that the humiliation suffered was not, as a matter of law, so intense as to constitute the "severe" emotional distress required to recover for the tort of intentional infliction of emotional distress.

Judgment affirmed; costs to be paid by appellant.

NOTES AND QUESTIONS

1. *Conduct Exceeding All Bounds Usually Tolerated by Decent Society.* How culpable must defendant's conduct be before it reaches the level of being extreme enough to be deemed tortious? Some guidelines can be found in decided cases. For example, it is generally held that the mere solicitation of a woman to illicit intercourse is not only not an assault but does not give rise to any other cause of action. Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903). "The view being, apparently, that there is no harm in asking." Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033, 1055 (1936). Jones v. Clinton, 990 F.Supp. 657, 677 (E.D.Ark.1998) (applying Arkansas law) ("While the Court will certainly agree that plaintiff's allegations describe offensive conduct, the Court, as previously noted, has found that the Governor's alleged conduct does not constitute sexual assault. Rather, the conduct as alleged by plaintiff describes a

2. The fact that Harris may have had some pre-existing susceptibility to emotional distress does not necessarily preclude liability if it can be shown that the conduct intensified the pre-existing condition of psychological stress. [Cc]

mere sexual proposition or encounter, albeit an odious one.... The Court is not aware of any authority holding that such a sexual encounter or proposition of the type alleged in this case, without more, gives rise to a claim of outrage.")

In Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), a married woman was hounded by continued telephone calls from May to December, some of them late at night; and on one occasion defendant came to her home and made an indecent exposure of his person. The court stated that under usual circumstances solicitation would not be actionable ("It seems to be a custom of long standing and one which in all likelihood will continue"), but found the "aggravated circumstances" in this case sufficient to make the defendant liable.

Plaintiff alleged that her rabbi had induced her to enter into a sexual relationship with him in the guise of therapy to assist her in finding a husband. Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22, 892 N.E.2d 375, 862 N.Y.S.2d 311 (2008) (even if plaintiff could prove that her acquiescence was obtained through lies, manipulation, or other morally opprobrious conduct, the rabbi's conduct was not so outrageous in character and extreme in degree so as to go beyond all possible bounds of decency and be utterly intolerable in a civilized community).

2. Courts are reluctant to subject either internal family disputes or petty but strongly felt antagonisms to the sanctions of tort law. However, when conduct exceeds all reasonable bounds of behavior tolerated by society, courts are likely to find that a claim has been stated. Cf. Miller v. Currie, 50 F.3d 373 (6th Cir.1995) (applying Ohio law) (plaintiff's brother and sister-in-law and the employees of a nursing home prevented her from seeing her ninety-eight-year old mother); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) (man who had jilted a woman wrote her jeering verses and taunting letters); Jackson v. Brown, 904 P.2d 685 (Utah 1995) (last minute cancellation of wedding not enough for outrage, but courting woman, proposing, and making arrangements for wedding including applying for license while married to someone else may be); Smith v. Malouf, 722 So.2d 490 (Miss. 1998) (teenager and her parents hid her location from the father of her baby so that baby could be secretly placed with strangers for adoption); Flamm v. Van Nierop, 56 Misc.2d 1059, 291 N.Y.S.2d 189 (1968) (defendant constantly drove behind plaintiff at a "dangerously close distance," phoned him unnecessarily at his home and business and either hung up or remained on the line in silence, and "dashed" at him in public places).

3. Is filing a frivolous lawsuit against someone conduct that is sufficiently outrageous to permit recovery for intentional infliction of emotional distress? After being injured in a fight in a parking lot that was poorly lit, crowded, and chaotic, plaintiff identified a man as her assailant even though she only had a vague impression of the physical characteristics of the person responsible for breaking her leg and someone else had apologized for causing her injury. After the man she identified was found not guilty on the criminal charges arising out of her identification, plaintiff filed a civil suit against the man. He counterclaimed for intentional infliction of emotional distress. Davis v. Currier, 704 A.2d 1207 (Maine 1997) (no cause of action for intentional infliction of emotional distress); Swerdlick v. Koch, 721 A.2d 849 (R.I. 1998) (no cause of action against neighbor who repeatedly photographed and maintained a log of activity in attempt to prove plaintiffs were illegally operating a mail-order business out of their home). What if a juror, found in contempt for failing to show up one day two weeks into the trial of someone accused of torturing and killing six people, was placed alone in a jail cell with the alleged murderer, was questioned and berated by the alleged murderer, and was

laughed at by the jailors who placed her there? Johnson v. Wayne County, 213 Mich.App. 143, 540 N.W.2d 66 (1995) (states a cause of action).

4. What if a hospital had a policy of placing patients infected with the HIV virus in the same rooms as patients who were not, without disclosing that fact? Patient accidentally used his roommate's razor to shave and was then informed by the roommate that roommate was infected with HIV. Patient alleges that the hospital's conduct is outrageous and that he suffered severe emotional distress as a result. Liability? What other information would you like to have before deciding this issue? Bain v. Wells, 936 S.W.2d 618 (Tenn.1997).

5. Is there any common theme or set of similar factors running through the following cases?

A. State Rubbish Collectors Association v. Siliznoff, page 51.

B. Defendant, a private detective representing that he was a police officer, threatened to charge the plaintiff, a resident alien, with espionage unless she turned over to him certain private letters in her possession. She suffered severe mental disturbance and was made seriously ill. The defendant was held liable. Janvier v. Sweeney, [1919] 2 K.B. 316.

C. Defendants, school authorities, called a high school girl to the school office and bullied and badgered her for a considerable length of time, threatening her with prison and with public disgrace for herself and her family, unless she confessed to immoral conduct with various men. They succeeded in extorting from her a confession of misconduct, of which she was innocent. She suffered severe mental disturbance and resulting illness. Defendants were held liable. Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).

D. *Collecting Agencies.* While reasonable attempts to collect a debt lead to no liability, even though they may be expected to, and do, cause serious mental distress, more extreme conduct may produce a different result. Defendant, a creditor, had plaintiff called to the telephone of her neighbor, with the message that it was an emergency call. Defendant began the conversation by telling plaintiff that "this is going to be a shock; it is as much of a shock to me to have to tell you as it will be to you." When plaintiff said that she was prepared for the message, the defendant let her have it: "This is the Federal Outfitting Company—why don't you pay your bill?" Plaintiff suffered severe nervous shock and resulting serious illness. A complaint alleging these facts was held to state a cause of action. Bowden v. Spiegel, Inc., 96 Cal.App.2d 793, 216 P.2d 571 (1950). A veterinarian and an animal hospital threaten to "do away with" plaintiffs' dog unless plaintiffs paid in cash a bill for treating the dog for injuries suffered when struck by an automobile. See Lawrence v. Stanford and Ashland Terrace Animal Hospital, 655 S.W.2d 927 (Tenn.1983). See also Cadle Co. v. Hobbs, 673 So.2d 1363 (La. App. 1996) (implying that because plaintiff was African–American, no one would take her word against debt collector's).

E. There are similar cases involving the outrageous tactics of insurance adjusters seeking to force a settlement. Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935). See also, as to refusal of a liability insurer to settle a claim, Fletcher v. Western Nat. Life Ins. Co., 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970). When the insurance company is reasonable in its refusal to settle a claim, it will *not* be held liable simply because its client happened to be an excessive worrier about fiscal problems. See Rossignol v. Noel, 289 A.2d 691 (Me.1972).

F. Other cases have involved evicting landlords, Kaufman v. Abramson, 363 F.2d 865 (4th Cir.1966), and even high pressure salesmen. See Turner v. ABC Jalousie Co., 251 S.C. 92, 160 S.E.2d 528 (1968).

6. Many cases, like the principal case, arise out of workplace behavior. Anderson v. Oklahoma Temp. Svcs., Inc., 925 P.2d 574 (Okla. App. 1996) (supervisor's use of profanity, smoking around employee after being asked to stop, and vulgar behavior not enough to state a cause of action for extreme and outrageous conduct) and Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) (employer liable for intentional infliction of emotional distress of plaintiff due to co-employee's actions in repeatedly subjecting plaintiff to physical assaults and vulgar remarks). In the employment context, some courts have held that a plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger while others do not. Compare Alcorn v. Anbro Eng'g, Inc., 2 Cal.3d 493, 468 P.2d 216, 86 Cal.Rptr. 88 (1970) with Texas Farm Bureau Mut. Ins. Cos. v. Sears, 84 S.W.3d 604, 611 (Tex. 2002) (while an employer's conduct might in some instances be unpleasant, the employer must have some discretion to "supervise, review, criticize, demote, transfer, and discipline" its workers; thus, only very unusual employment disputes will give rise to cause of action for intentional infliction of emotional distress).

7. *Vulnerability of Plaintiff.* The plaintiff's sensitivities may be a factor in deeming defendant's conduct extreme and outrageous. Cf. Korbin v. Berlin, 177 So.2d 551 (Fla.App.1965), where defendant approached a six-year-old girl and said to her: "Do you know that your mother took a man away from his wife? Do you know that God is going to punish them? Do you know that a man is sleeping in your mother's room? God will punish them." It was alleged that the child suffered serious mental distress and resulting physical injury. Should a demurrer to a complaint pleading these facts be overruled? Cf. Delta Fin. Co. v. Ganakas, 93 Ga.App. 297, 91 S.E.2d 383 (1956) (eleven-year-old child home alone frightened by threats she would be taken to jail if she did not open door for defendant seeking to repossess television set). Drejza v. Vaccaro, 650 A.2d 1308 (D.C.App.1994) (outrageousness of police officer's conduct while interviewing rape victim must be evaluated in light of the fact that it occurred only an hour after the rape, when she would be expected to be more susceptible to emotional distress). Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001) (same). After fourteen years, Plaintiff's illness made her no longer able to care for her two beloved Appaloosa horses, so she made arrangements for them to be pastured on defendants' property. Although defendants assured her they would take good care of the horses and return them to her if they could no longer keep them, they in fact sold them to a buyer for slaughter within a week of when they arrived. When plaintiff came to visit them and discovered them gone, defendants lied about their whereabouts and covered up the sale until it was too late for plaintiff to save the horses from the slaughter house. Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001) (in upholding jury verdict for plaintiff, court notes it appropriate to take into account defendants' knowledge of plaintiff's vulnerability to emotional distress based on her attachment to the horses).

8. Should special protection be accorded to pregnant women? When a creditor came to the house of a woman seven months pregnant and screamed profanity, abuse, and accusations of dishonesty in the presence of others and she suffered severe emotional disturbance which resulted in a miscarriage, she was allowed to recover in Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936). See Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948), a holding that otherwise was overruled by Yeager v. Local Union 20, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983).

9. Should protection also be given to the hypersensitive or idiosyncratic plaintiff? In one early landmark case, protection was allowed. Plaintiff, an eccentric woman who had in the past been treated for mental illness, believed that her ancestors had concealed a pot of gold by burying it. After a fortune teller gave her a map that purportedly showed the land upon which the pot was buried, she spent months digging for it. Defendants filled a pot with rocks and dirt and buried it where plaintiff would find it, placing a note on it that directed the finder to gather all the heirs and wait three days before opening it. A large number of townspeople, including the practical jokers, the heirs, a judge, and other town officials, gathered at the local bank to observe plaintiff open the pot in circumstances of extreme public humiliation. She suffered acute mental distress, with resulting serious illness, which apparently further unsettled her reason and contributed to her early death. The "pot of gold" came in the form of a judgment to her heirs. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

10. *Severe Emotional Distress.* All jurisdictions require that the plaintiff prove *severe* not just *mere* emotional distress. This is frequently characterized as distress so severe that no reasonable person could be expected to endure it. Note that unlike most torts, the severity of the damage affects not just how much the plaintiff will recover, but whether the plaintiff recovers at all.

11. *Proof of Severe Emotional Distress.* Testimony that the plaintiff was upset and cried will not be enough. Hatch v. State Farm Fire and Cas. Co., 930 P.2d 382, 397 (Wyo. 1997) ("evidence of crying, being upset and uncomfortable is insufficient to demonstrate severe emotional distress that attains a level no reasonable person could be expected to endure"). Some jurisdictions require that the severe emotional distress be proved by expert witness testimony. Vallinoto v. DiSandro, 688 A.2d 830, 838 (R.I. 1997) (plaintiff must produce "competent medical evidence showing objective physical manifestation of her alleged psychic injuries"). Most, however, do not generally require expert proof to establish severe emotional distress caused by defendant's conduct, preferring to rely on such factors as the flagrant and serious nature of the defendant's conduct, subjective testimony from plaintiff and others, and physical symptoms, if present. Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999) (collecting cases from other jurisdictions); Kloepfel v. Bokor, 149 Wash.2d 192, 66 P.3d 630 (2003) (rejecting argument that objective symptomatology is required to prove severe emotional distress); Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001) (noting connection between outrageousness of conduct and proof of severe emotional distress); Sacco v. High Country Independent Press, Inc., 271 Mont. 209, 896 P.2d 411 (1995) (evidence of physical injury not necessary to determine whether plaintiff suffered severe emotional distress). Suppose a surgeon, angry at an operating-room nurse, throws a surgical drape into her face, covering her with the patient's blood and tissue. Both the nurse and the patient underwent a series of tests for HIV, hepatitis, and other communicable diseases. All were negative. Is her testimony that she feared for her life and suffered severe emotional distress at the thought of the risk sufficient? Grantham v. Vanderzyl, 802 So.2d 1077 (Ala. 2001) (court finds as a matter of law that the mere fear of contracting a disease, without actual exposure to it, cannot be sufficient to cause the level of distress necessary for tort of outrage).

Taylor v. Vallelunga

District Court of Appeal of California, 1959.
171 Cal.App.2d 107, 339 P.2d 910.

O'DONNELL, JUSTICE pro tem. * * * In the first count, plaintiff Clifford Gerlach alleges that on December 25, 1956, defendants struck and beat him

causing him bodily injury for which he seeks damages. In the second count, plaintiff and appellant Gail E. Taylor incorporates by reference the charging allegations of the first count and proceeds to allege that she is the daughter of plaintiff Clifford Gerlach, that she was present at and witnessed the beating inflicted upon her father by defendants, and that as a result thereof, she suffered severe fright and emotional distress. She seeks damages for the distress so suffered. It is not alleged that any physical disability or injury resulted from the mental distress. A general demurrer to the second count of the complaint was interposed by defendants. The demurrer was sustained and appellant was granted ten days leave to amend. Appellant failed to amend and judgment of dismissal of the second count was entered. The appeal is from the judgment of dismissal.

The California cases have for some time past allowed recovery of damages where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. [C] In the Siliznoff case [page 51] the Supreme Court extended the right of recovery to situations where no physical injury follows the suffering of mental distress, saying that "a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault." [C] In arriving at this result the court relied in substantial part upon the development of the law in this field of torts as traced by the American Law Institute, and it quotes with approval [c] section 46, as amended, of the Restatement of Torts, (Restatement of the Law, 1948 Supplement, Torts, § 46) which reads: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." In explanation of the meaning of the term "intentionally" as it is employed in said section 46, the Reporter says in subdivision (a) of that section: "An intention to cause severe emotional distress exists when the act is done for the purpose of causing the distress or with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct. See Illustration 3." Illustration 3 referred to reads as follows: "A is sitting on her front porch watching her husband B, who is standing on the sidewalk, C, who hates B and is friendly to A, *whose presence is known to him,* stabs B, killing him. C is liable to A for the mental anguish, grief and horror he causes." [Emphasis added.]

The failure of the second count of the complaint in the case at bar to meet the requirements of section 46 of the Restatement of Torts is at once apparent. There is no allegation that defendants knew that appellant was present and witnessed the beating that was administered to her father; nor is there any allegation that the beating was administered for the purpose of causing her to suffer emotional distress, or, in the alternative, that defendants knew that severe emotional distress was substantially certain to be produced by their conduct. * * *

Judgment affirmed.

NOTES AND QUESTIONS

1. Plaintiff's proof of intent is relatively straight forward if the conduct is aimed at the plaintiff or if plaintiff can show that defendant knew that extreme emotional distress was substantially certain to follow from the conduct. Blakeley v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945) (Shortal committed suicide by slitting his own throat in Blakely's kitchen). Generally, committing a murder or a suicide is not a tort against an eyewitness; however, it may be if the act is directed at the plaintiff or if defendant knew that extreme emotional distress was substantially certain to follow. Lourcey v. Scarlett, 146 S.W.3d 48 (Tenn. 2004) (plaintiff, while delivering mail, encountered Scarlett and his wife, who was nude from the waist up, in the middle of the road. Scarlett asked for help and then, while plaintiff was calling 911, Scarlett shot his wife, turned toward the plaintiff, and shot himself); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923, 927 (1951) (overturning demurrer where child's father killed her mother with a shotgun in her presence, kept child in cottage with her mother's body for a week, then killed himself with shotgun, spattering child with his blood). Why not use "transferred intent"? See note 2, page 30.

2. As California did in the principal case, many jurisdictions continue to require that the conduct not only be intentional and outrageous, but also directed at the plaintiff or take place in the presence of the plaintiff, with the defendant's awareness. Christensen v. Superior Court of Los Angeles Cty., 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991) (claim of family members for intentional infliction of emotional distress arising out of mishandling of remains of family members did not state cause of action because it did not allege that conduct was directed at family members or done in their presence); Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936) (recovery denied where defendant murdered plaintiff's sister and plaintiff later discovered body); Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921) (plaintiff later discovered attack on her husband). But see Doe v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22 (Tenn. 2005) (conduct need not be directed at a specific person or occur in the presence of the plaintiff).

3. The Restatement (§ 46(2)) would allow recovery if defendant knows of bystander's presence *and* (1) the conduct was directed at a member of bystander's immediate family or (2) bystander suffers bodily harm as a result of her distress. Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890) (defendant inflicted a bloody battery upon two people in the presence of a pregnant woman who suffered a miscarriage as the result of her mental disturbance). What does it mean to be "present"? Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002) (claim on behalf of young children who could hear their mother being attacked in adjacent hallway) ("sensory and contemporaneous observance of defendant's acts," does not necessarily require being able to see what is happening).

4. Some courts, however, have permitted recovery even though plaintiff was not present. Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961) (defendant threatened a woman that he would murder her husband and then carried out the threat outside of her presence); Schurk v. Christensen, 80 Wash.2d 652, 497 P.2d 937 (1972) (mother of five-year-old permitted to recover against teenage babysitter who molested child). In R.D. v. W.H., 875 P.2d 26 (Wyo. 1994), the husband and minor child of decedent sued her stepfather for events leading to her death by suicide. Plaintiffs alleged that the stepfather had sexually abused the decedent, provided her with a firearm with which she attempted suicide, and then provided her with prescription narcotics with which she killed herself. Although emphasizing that the generally better practice is to limit recovery to plaintiffs who were present

during the outrageous conduct, the court recognized a narrow exception for this case.

5. How far should these narrow exceptions go? Should there be a cause of action on behalf of those who witness the assassination of the president? For those who saw it live on television? For those who saw it replayed a few minutes later? The next day? On the first anniversary?

6. The classic articles on the infliction of mental distress are Magruder, Mental and Emotional Distress in the Law of Torts, 49 Harv.L.Rev. 1033 (1936); Prosser, Insult and Outrage, 44 Cal.L.Rev. 40 (1956); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand.L.Rev. 63 (1950); Partlett, Tort Liability and the American Way: Reflections on Liability for Emotional Distress, Am.J. Comp.L. 601 (1997); and Kircher, The Four Faces of Tort Law: Liability for Emotional Harm, 90 Marq. L. Rev. 789 (2007) (including an appendix with case law from all fifty-one jurisdictions).

6. TRESPASS TO LAND

Dougherty v. Stepp

Supreme Court of North Carolina, 1835.
18 N.C. 371.

This was an action of trespass quare clausum fregit, tried at Buncombe on the last Circuit, before his Honor Judge Martin. The only proof introduced by the plaintiff to establish an act of trespass, was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury under his instructions, found a verdict for the defendant, and the plaintiff appealed. * * *

RUFFIN, CHIEF JUSTICE. In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or herbage, or as here, the shrubbery.

Judgment reversed, and new trial ordered.

NOTES AND QUESTIONS

1. We are here concerned only with intentional trespass to land. There may be negligent entry onto land, but it is governed by the ordinary rules applicable to negligence actions. One of these is that when the entry upon the land is merely negligent, proof of some actual damage is essential to the cause of action. Restatement (Second) of Torts § 165. Thus, the word "trespass" may be used to describe the kind of interest that defendant has invaded but usually is reserved for an intentional invasion of that interest—the right to exclusive possession of land.

2. The trespass is intentional even when the defendant enters the land in the honest and reasonable belief that it is his own. See Glade v. Dietert, 156 Tex. 382,